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In the Supreme Court of the United States

BOBBY JOHNSON
Petitioner,

DEC 27 2002

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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321 pp

QUESTIONS PRESENTED

1. Whether the Fifth Circuit's affirmance, in conflict with other federal circuits, of the empanelment below of an anonymous jury violated petitioner's rights under the Sixth Amendment and federal law to be tried by an impartial jury that presumes his innocence.

2. Whether the Fifth Circuit's affirmance, in conflict with other federal circuits, of the decision below to try petitioner *in absentia* because of a medical condition that was neither manipulated nor contrived and required extended hospitalization, violated petitioner's rights under the Fifth and Sixth Amendments and federal law to be present at trial, to confront his accusers, and to testify on his own behalf.

3. Whether the Fifth Circuit's affirmance, in conflict with other federal circuits, of the dismissal of a juror identified to the trial court as holding a view of the government's evidence different from the views of the other jurors, where no showing of mental or physical incapacity was made, violated petitioner's rights under the Sixth Amendment and federal law to an unanimous jury verdict.

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Cecil Brown;

Governor Edwin Edwards;

Stephen Edwards;

Bobby Johnson;

Andrew Martin; and

The United States of America.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 30

APPENDIX

INDEX TO APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Apodaca v. Oregon,
406 U.S. 404 (1972) 24

Apprendi v. New Jersey,
530 U.S. 466 (2000) 5-6, 8, 21

Bordenkircher v. Hayes,
434 U.S. 357 (1978) 19

Crosby v. United States,
506 U.S. 255 (1993) 14, 18, 20

Faretta v. California,
422 U.S. 806 (1975) 13, 18, 20

Hibdon v. United States,
204 F.2d 834 (6th Cir. 1953) 24-25

Illinois v. Allen,
397 U.S. 337 (1970) 13-16, 21

Johnson v. Louisiana,
406 U.S. 356 (1972) 6, 24-25

Kentucky v. Stincer,
482 U.S. 730 (1987) 13

Maryland v. Craig,
497 U.S. 836 (1990) 20

Patton v. United States,
281 U.S. 276 (1930), *overruled on other grounds*,
Williams v. Florida, 399 U.S. 78 (1970) 6, 8

Polizzi v. United States,
926 F.2d 1311 (2d Cir. 1991) 7

Remmer v. United States,
347 U.S. 227 (1954) 27

Reno v. American Civil Liberties Union,
521 U.S. 844 (1997) 12

Riggins v. Nevada,
504 U.S. 127 (1992) 12

Rock v. Arkansas,
483 U.S. 44 (1987) 18, 20

Tanner v. United States,
483 U.S. 107 (1987) 27

Taylor v. Kentucky,
436 U.S. 478 (1978) 9

Taylor v. United States,
414 U.S. 17 (1973) 15, 17

Thompson v. Western States Medical Center,
122 S. Ct. 1497 (2002) 12

Tot v. United States,
319 U.S. 463 (1943) 9

Unabom Trial Media Coalition v. United States District Court, 183 F.3d 949 (9th Cir. 1999), *cert. denied*, 122 S. Ct. 1309 (2002) 10-12

United States v. Abbell,
271 F.3d 1286 (11th Cir. 2001),
cert. denied, 123 S. Ct. 74 (2002) 27

United States v. Beard,
161 F.3d 1190 (9th Cir. 1998) 7, 25

United States v. Branch,
91 F.3d 699 (5th Cir. 1996),
cert. denied, 520 U.S. 1185 (1997) 10-11

United States v. Brown,
298 F.3d 392 (5th Cir. 2002) 9

United States v. Brown,
823 F.2d 591 (D.C. Cir. 1987) 26-27

United States v. Cheyenne,
855 F.2d 566 (8th Cir. 1988) 29

United States v. Crites,
176 F.3d 1096 (8th Cir. 1999) 17, 20

United States v. Crockett,
979 F.2d 1204 (7th Cir. 1992),
cert. denied, 507 U.S. 998 (1993) 10

United States v. Darden,
70 F.3d 1507 (8th Cir. 1995),
cert. denied, 517 U.S. 1149 (1996) 10

United States v. DeLaVega,
913 F.2d 861 (11th Cir. 1990),
cert. denied, 500 U.S. 916 (1991) 28-29

United States v. Edwards,
303 F.3d 606 (5th Cir. 2002) 1

United States v. Edwards,
119 F. Supp. 2d 589 (M.D. La. 2002) 1-2

United States v. Gagnon,
470 U.S. 522 (1985) 14, 17

United States v. Geffrard,
87 F.3d 448 (11th Cir.),
cert. denied, 519 U.S. 985 (1996) 25

United States v. Gomez-Lepe,
207 F.3d 623 (9th Cir. 2000) 24

United States v. Latham,
874 F.2d 852 (1st Cir. 1989) 15, 18-21

United States v. Lawrence,
248 F.3d 300 (4th Cir. 2001) 18

United States v. Mansoori,
304 F.3d 635 (7th Cir. 2002) 10

United States v. McVeigh,
No. 96 Cr. 00068 (D. Colo.) 12

United States v. Navarro,
169 F.3d 228 (5th Cir.),
cert. denied, 528 U.S. 845 (1999) 18

United States v. Nichols,
56 F.3d 403 (2d Cir. 1995) 17, 19

United States v. Novaton,
271 F.3d 968 (11th Cir. 2001),
cert. denied, 122 S. Ct. 2345 (2002) 15, 17-21

United States v. Paccione,
949 F.2d 1183 (2d Cir. 1991),
cert. denied, 505 U.S. 1220 (1992) 7

United States v. Pastor,
557 F.2d 930 (2d Cir. 1977) 20-21

United States v. Peterson,
524 F.2d 167 (4th Cir. 1975),
cert. denied, 423 U.S. 1088 (1976) 19

United States v. Reese,
33 F.3d 166 (2d Cir. 1994),
cert. denied, 513 U.S. 1092 (1995) 25

United States v. Ross,
33 F.3d 1507 (11th Cir. 1994),
cert. denied, 515 U.S. 1132 (1995) 9-10

United States v. Ruggiero,
928 F.2d 1289 (2d Cir.),
cert. denied, 502 U.S. 938 (1991) 25

United States v. Smedes,
760 F.2d 109 (6th Cir. 1985) 26

United States v. Steele,
785 F.2d 743 (9th Cir. 1986) 29

United States v. Symington,
195 F.3d 1080 (9th Cir. 1999) 26-27

United States v. Thomas,
116 F.3d 606 (2d Cir. 1997) 26-27, 29

United States v. Tortora,
464 F.2d 1202 (2d Cir.)
cert. denied, 409 U.S. 1063 (1972) 17, 19-20

United States v. Watkins,
983 F.2d 1413 (7th Cir. 1993) 15, 18-19

United States v. Wilson,
894 F.2d 1245 (11th Cir.),
cert. denied, 497 U.S. 1029 (1990) 25

Valenzuela-Gonzalez v. United States District Court,
915 F.2d 1276 (9th Cir. 1990) 18

Wayte v. United States,
470 U.S. 598 (1985) 19

STATUTES

18 U.S.C. §1001 3

18 U.S.C. §§1341-1347 3

18 U.S.C. §1952 3

18 U.S.C. §1956 3

Racketeer Influenced and Corrupt Organizations Act,
18 U.S.C. §§1961-1968 3

28 U.S.C. § 547 19

28 U.S.C. §1254(1) 2

RULES

Fed. R. Crim. P. 23(a), 31(a) 7

Fed. R. Crim. P. 23(b) 22, 25

Fed. R. Crim. P. 23(b) Advisory Committee Notes,
1983 25

Fed. R. Crim. P. 24(a) 7

Fed. R. Crim. P. 31 24

Fed. R. Crim. P. 43 ..... 7, 14-15

Fed. R. Crim. P. 44 7

MISCELLANEOUS

Adam Liptak, *Nameless Juries Are On the Rise in Crime Cases*, New York Times, at A1 (Nov. 18, 2002) 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Bobby Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, appended hereto at App. 5a, is reported at 303 F.3d 606 (5th Cir. 2002). The opinion of the United States District Court for the Middle District of Louisiana denying the motion of Edwin Edwards, Stephen Edwards and Andrew Martin for a new trial, appended hereto at App. 79a, is not reported. The opinion of the United States District Court for the Middle District of Louisiana denying Bobby Johnson's and Cecil Brown's motion for a new trial, appended hereto at App. 81a, is not reported. The opinion granting the government's motion for an anonymous jury,

appended hereto at App. 167a, is reported at 119 F. Supp. 2d 589 (M.D. La. 2002).

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2002. (App. 5a). Timely petitions for rehearing and for rehearing en banc were denied on September 23, 2002. (App. 79a-82a). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent language of the Fifth and Sixth Amendments to the United States Constitution and of Rules 23(b), 24(a), 31(a), 43, and 44 of the Federal Rules of Criminal Procedure are set forth in the Appendix hereto at App. 2a-4a.

STATEMENT OF THE CASE

This petition raises three issues central to the constitutional right to a jury trial which arise from the trial and conviction of former Louisiana Governor Edwin Edwards, his son, and several of his friends and associates, including petitioner Bobby Johnson.[1]

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[1] Several of the co-defendants tried with defendant Johnson, namely: Edwin and Stephen Edwards, Andrew Martin and Cecil Brown, are simultaneously filing separate certiorari petitions making some of the same arguments (*i.e.*, Issues I and III), as well as others. Defendant Johnson obviously supports a grant of certiorari as to the overlapping issues set forth in their petitions.

Former Governor Edwards, his son Stephen Edwards, petitioner Bobby Johnson, and four other friends of the former governor were charged by the United States with crimes relating to schemes to extort money from individuals who sought licenses for riverboat casino gambling from the Louisiana Riverboat Gaming Commission. The charges included allegations of a criminal conspiracy under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1968; mail and wire fraud, 18 U.S.C. §§1341-1347; money laundering, 18 U.S.C. §1956; interstate travel and communication in aid of racketeering, 18 U.S.C. §1952; and false statements, 18 U.S.C. §1001. (R2392; Doc. #306).[2]

After a 17 week trial before the United States District Court for the Middle District of Louisiana, on May 9, 2000, the jury convicted former Governor Edwards, Stephen Edwards, Bobby Johnson, and co-defendants Andrew Martin and Cecil Brown on a variety of charges. (R7826; Doc. #1392) Two other co-defendants were acquitted on all charges. (App. 6a). Petitioner Johnson was found guilty on charges of interstate communication in aid of racketeering, fraud, and false statements. (R7678; Doc. #1347). The Fifth Circuit affirmed the convictions on August 23, 2002 (App. 78a), and petitions for rehearing were denied on September 23, 2002 (App. 79a-82a).

During the trial, the district court made three rulings that impacted Johnson's constitutional rights to be tried by an impartial jury and receive an unanimous verdict. First, to protect the jurors from media attention, the district court

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[2] Citations to the record below use the following abbreviations: Trial Transcript ("T"), Record Page ("R"), Chambers Conference ("C"), Docket ("Doc."), and Record Excerpt ("RE"). Transcript and Chambers Conference cites are followed by a date and page numbers.

empanelled an anonymous jury, even though there was no evidence that any defendant posed a threat to the safety or integrity of the jurors. Second, during the eleventh week of the trial, as the prosecution rested, Johnson's critical heart condition forced him to undergo emergency bypass surgery and to miss the remainder of the trial, but the district court ordered that the defense and trial proceed in his absence, notwithstanding petitioner Johnson's express refusal to waive his constitutional right to be present. Third, during jury deliberations, the district court dismissed the sole juror identified by the others as being uncooperative, after that juror had expressed to the trial court his position in favor of the defendants, on grounds that the juror had failed to follow the court's instructions about bringing books and papers into the jury room and to be candid with the court about this conduct. An unanimous guilty verdict was thereafter rendered by the remaining 11 jurors.

The Fifth Circuit affirmed. On the anonymous jury issue, the Fifth Circuit upheld the district court's decision to withhold identifying information about the jurors from the parties because of its "overriding concern" for protecting jurors from media attention. (App. 13a). The court of appeals also endorsed the district court's use of unsubstantiated allegations in this and other cases to support its finding that the defendants posed a risk to the integrity of the judicial process. (App. 13a-14a). On the issue of ordering Johnson to be tried *in absentia* over his objection, the Fifth Circuit observed that the heart condition that necessitated Johnson's surgery and absence from trial was not manipulated or faked. (App. 41a). Nevertheless, the court of appeals upheld the district court's finding that Johnson had voluntarily waived his constitutional right to be present, because his refusal to waive this right, after the surgery mandated his absence, was uncooperative and disruptive of the ongoing trial, and was presumptively based

on Johnson's trial strategy of wanting to be tried with his co-defendants. (App. 42a-43a).

The Fifth Circuit also upheld the decision to dismiss Juror 68, whom the district court had learned held views of the evidence that differed from those of the other jurors. (App. 52a). Dismissal was based on Juror 68's failure to follow instructions and to be candid with the court, not on his mental or physical incapacity to render a verdict. (App. 46a). The court of appeals reasoned that, because the district court had articulated a basis for dismissal unrelated to Juror 68's opinion of the evidence, it did not matter that the motive for seeking Juror 68's dismissal was his views on the merits of the case. (App. 51a-52a).

For the reasons set forth below, these several rulings, in direct violation of the fundamental jury trial rights of petitioner Johnson, conflict with decisions of this Court and of other circuit courts of appeals. Petitioner is, therefore, seeking plenary review by this Court.

REASONS FOR GRANTING THE WRIT

This case concerns the rights of criminal defendants to be tried by a jury and receive an unanimous jury verdict. At issue is the important and recurring question of what level of judicial interference with those fundamental rights is constitutionally acceptable. The federal circuits are in irreconcilable disagreement on both the answer to this inquiry and the proper substantive standard to be applied to reach that answer. Review by this Court is therefore needed to resolve the appellate court conflicts.

"[T]rial by jury has been understood to require that 'the truth of every accusation . . . should afterwards be

confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors . . . .'" *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (*quoting*, 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)). This fundamental right is to be "jealously preserved," *Patton v. United States*, 281 U.S. 276, 312 (1930), *overruled on other grounds*, *Williams v. Florida*, 399 U.S. 78 (1970), together with its "essential elements." *Id.* at 313; *Apprendi*, 530 U.S. at 477 (Due Process Clause and Sixth Amendment guarantee defendant's right to a jury determination that he is guilty beyond a reasonable doubt on every element of the crime charged); *Johnson v. Louisiana*, 406 U.S. 356, 363 (1972) (federal court right to unanimous jury); *Patton*, 281 U.S. at 312 (waiver of rights with respect to jury that tries him must be by defendant's "express and intelligent consent").

Here, the trial court's interference with petitioner Johnson's jury trial rights occurred not just once, but on multiple occasions. Affirmance of these multiple intrusions by the Fifth Circuit conflicts with precedents of this Court and rulings in other circuits. If allowed to stand, the decision below will nurture the very "erosion" of the Sixth Amendment that the Framers of the Constitution feared most. *Apprendi*, 530 U.S. at 483 (*quoting, Jones v. United States*, 526 U.S. 227, 247-48 (1999)).

In order to ensure that the guarantee of a right to trial by jury has meaning, certain procedural safeguards have been imposed by this Court and Congress under the Federal Rules of Criminal Procedure.[3] There is at the outset the right to *voir dire* prospective jurors so as to discern on the basis of

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[3] The Federal Rules of Criminal Procedures were judicially formulated and, after approval by this Court, were submitted to Congress for codification. *See* Orders of the Supreme Court of the United States Adopting and Amending Rules.

personal background or attitude whether those who might be empanelled bring into the courtroom any external biases or prejudices. *See* Fed. R. Crim. P. 24(a). There is, as well, the right of a defendant to be present at trial, to confront his accusers, to confer with counsel, and to testify in one's own defense. *See* Fed. R. Crim. P. 43, 44. And there is the right to an unanimous jury verdict of 12 jurors. *See* Fed. R. Crim. P. 23(a), 31(a). In all three respects, the trial judge in this case determined that considerations of trial expediency and convenience outweighed the claimed protections.

In striking the same incorrect balance, the Fifth Circuit departed dramatically from the more exacting substantive standard of review imposed in like circumstances by other circuits. Heretofore, trial management concerns have not been allowed to eviscerate substantive jury trial rights except on the most demanding of justifications, such as a real and present threat to juror safety or integrity (anonymous jury), *see United States v. Paccione*, 949 F.2d 1183, 1192-93 (2d Cir. 1991), *cert. denied*, 505 U.S. 1220 (1992); a knowing waiver of attendance at trial (trial *in absentia), see Polizzi v. United States*, 926 F.2d 1311, 1319 (2d Cir. 1991); or juror incapacity (removal of juror during final deliberations), *see United States v. Beard*, 161 F.3d 1190, 1193-94 (9th Cir. 1998).

Here, the trial court's several intrusions on the jury process were based on none of these justifications. Relying instead on reasoning far more solicitous of judicial efficiency and economy than of defendant's rights under the Constitution and federal law, the district judge (i) determined, *sua sponte*, to impose the "anonymous jury" rule out of an overabundance of concern, not for juror safety, but for media coverage (App. 13a); (ii) ordered the trial to proceed in defendant Johnson's absence (due to emergency heart surgery) so as to maintain the trial schedule and avoid

undue delay, notwithstanding the lack of a voluntary waiver (App. 39a); and (iii) removed in the middle of jury deliberations the lone "hold-out" juror, not because of physical or mental incapacity, but because of juror misconduct relating to bringing books and papers into and out of the jury room -- conduct that, when previously brought to the trial judge's attention, was not regarded as sufficient to warrant considering dismissal (App. 46a).

The Fifth Circuit's affirmance paves the way for trial judges to deprive defendants of essential jury trial rights simply in furtherance of what they regard as legitimate trial management considerations. According to the decision below, no longer are these basic guarantees the defendant's to exercise or waive. Their availability depends, instead, on subjective concerns left largely to the discretion of the courts, not the objectively ascertainable considerations of juror safety and integrity, defense waiver, or juror incapacity -- which heretofore have been the sole justifications accepted by other circuits as sufficient for compromising jury trial rights. Because the opinion of the Fifth Circuit is, in the several important respects set forth below, in direct conflict with other federal circuits, and, if left to stand, introduces the very sort of judicial erosion of the right to trial by jury that this Court indicated in *Apprendi*, 530 U.S. at 483, was most feared by the Framers -- and admonished in *Patton*, 281 U.S. at 313, was not to be tolerated by the judiciary -- the writ of certiorari should be granted.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHEN A COURT MAY EMPANEL AN ANONYMOUS JURY

Central to petitioner Johnson's right to a jury trial is his right to present his case to impartial jurors who are not

biased by fear that defendants threaten their safety. "An anonymous jury raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant's constitutional right to a presumption of innocence." *See United States v. Ross*, 33 F.3d 1507, 1520 (11th Cir. 1994), *cert. denied*, 515 U.S. 1132 (1995). The district court here empanelled an anonymous jury, despite the absence of evidence that any defendant posed a threat to juror safety or integrity. (R5754; App. 13a). While its ruling was based primarily on protecting jurors from the media, the district court also referenced unsubstantiated -- and ultimately unproven -- allegations of witness tampering by some defendants.[4] (App. 13a). The Fifth Circuit affirmed, finding that use of an anonymous jury was permissible to protect the jurors from the media, even if there is no evidence that the defendants pose a risk to juror safety or integrity. (App. 15a).

In so doing, the Fifth Circuit violated defendants' due process rights to a presumption of innocence, to an impartial jury, and to meaningful *voir dire* of the jury panel. The jurors' awareness of the anonymous jury decision may have led to a concern that defendants in fact threatened their safety, notwithstanding that no such threat existed, and thus

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[4] The courts below referred to an earlier case, *United States v. Brown*, 298 F.3d 392 (5th Cir. 2002), wherein co-defendant Edwin Edwards was accused of witness-tampering. (App. 13a-16a). Edwards was acquitted on those charges. (App. 13a n.3). To the extent the reference was intended to suggest the possibility of such behavior by a co-defendant here that posed a threat to jury integrity, unsubstantiated accusations of witness tampering hardly permit the inference that the accused had or would have engaged in such conduct. *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978); *Tot v. United States*, 319 U.S. 463, 466 (1943). This is particularly so where, as here, the witness-tampering suggestion being made comes from the same party -- the government -- that did not prove its earlier allegations.

introduced impermissibly the very real prospect of juror bias against defendants. Nor is this idle speculation. Media reports on this case observed that anonymous juries are used only when defendants pose a threat to the jury's safety or integrity and speculated that the government had such evidence. (R3041/Exh.A).

In several recent cases involving organized crime defendants, real threats to witnesses or jurors led the lower courts to endorse the use of anonymous juries. *See, e.g., United States v. Darden*, 70 F.3d 1507 (8th Cir. 1995) (defendants' enterprise had history of intimidating and murdering government witnesses), *cert. denied*, 517 U.S. 1149 (1996); *Ross*, 33 F.3d at 1520 (defendants ordered death of potential witness and threatened witnesses' relatives); *United States v. Crockett*, 979 F.2d 1204 (7th Cir. 1992) (evidence that defendant's organization had murdered and threatened potential witnesses), *cert. denied*, 507 U.S. 998 (1993).

However, the other circuit courts of appeals have recognized that this "drastic measure" of empanelling an anonymous jury should be undertaken only in very limited circumstances, *see Ross*, 33 F.3d at 1519. Most recently, in *United States v. Mansoori*, 304 F.3d 635, 650 (7th Cir. 2002), the Seventh Circuit held that the use of an anonymous jury was an "extreme measure" that constituted an abuse of discretion, because there was no evidence that the individual defendants posed any threat to the jurors. Indeed, in the Unabomber case, the jury was anonymous only from the press, and not the parties, notwithstanding the Ninth Circuit's observation that the "impending trial attracted extraordinary attention from the news media, the general public and crackpots nationwide, and managed to stir up 'deep passions' unusual even for high-publicity trials." *Unabom Trial Media Coalition v. United States Dist. Ct.*, 183 F.3d 949, 952 (9th

Cir. 1999) (*quoting, United States v. Branch*, 91 F.3d 699, 724 (5th Cir. 1996), *cert. denied*, 520 U.S. 1185 (1997), *cert. denied*, 122 S. Ct. 1309 (2002)).

Here, the case involved several high profile defendants, including former Governor Edwards, but there were no allegations that any of the defendants was involved in organized criminal activities of a violent nature. Nonetheless, the Fifth Circuit departed from the practice of its sister circuits and held that it was appropriate for the district court to withhold from the defendants identifying information about the jurors in order to protect the jurors from the media.[5] Its "overriding concern," and the factor most important to the district court's analysis, was the intense media interest and highly charged emotional and political fervor that surrounded the trial." (App. 13a).

The departure below from the more demanding substantive standard followed by other federal courts of appeals further sacrifices a defendant's right to test juror impartiality on a fully informed basis, on the one hand, to a judicial interest in protecting jurors from media attention, on the other. To accord juror interests in anonymity precedence over a defendant's constitutional rights not only impermissibly interferes with those rights, but also is contrary to longstanding constitutional principles that require the consideration of less intrusive alternatives when balancing constitutional rights against societal concerns. *See,*

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[5] This is not the first time that the Fifth Circuit has evinced a view of this issue in conflict with other courts of appeals. It previously suggested that an anonymous jury might be acceptable in the high profile case against the Branch Davidians. Notably, the *Branch* case was recognized to arouse "deep passions" such that the defendants' supporters might pose a threat to the jury. *See Branch*, 91 F.3d at 724. No suggestion was made that such passions were present here.

e.g., *Thompson v. Western States Med. Ctr.*, 122 S. Ct. 1497, 1506 (2002); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 846 (1997); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992). Here, as has been done in other cases with intense media coverage, the district court clearly could have accomplished its goal by withholding from the press information about the individual jurors without also denying that information to the parties. *See, e.g.*, *Unabom Trial Media Coalition*, 183 F.3d at 949; *United States v. McVeigh*, No. 96 Cr. 00068 (D. Colo.) (T4/15/97/pp.5133, 5160).

This Court has not yet addressed the constitutionality of withholding from the parties identifying information about individual jurors. The use of anonymous juries has become increasingly frequent, and proponents of the practice would have it become the rule, rather than the exception. *See* Adam Liptak, *Nameless Juries Are On The Rise in Crime Cases*, *New York Times*, at A1 (Nov. 18, 2002) (App. 275a). Indeed, the Fifth Circuit's decision is already being cited as a basis on which future courts may empanel anonymous juries to protect jurors from the media. (*See id.*)

This Court should review the question of whether the protection of jurors from media attention is a sufficient basis for empanelling an anonymous jury, especially given the infringement that such practice unavoidably has on a defendant's constitutional rights. A criminal defendant typically cannot control whether his trial will attract media attention, and neither his presumed innocence nor his ability to use identifying information about the jury pool[6] --

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[6] For example, during the jury deliberations in this case, questions arose about potential bias on the part of Juror 68 (who was eventually dismissed, *see* discussion pp. 22-30 *infra*) -- questions that might have been explored during *voir dire* if the parties had identifying information about Juror 68.

especially in the *voir dire* process -- should depend on the level of media interest. Rather, the decision to withhold such important information from the defendant should depend on evidence of threats to juror safety or integrity. The federal courts of appeals do not agree on this question, and this Court should resolve the existing conflict.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHEN A CRIMINAL PROSECUTION MAY PROCEED IN THE DEFENDANT'S ABSENCE

As a further erosion of petitioner Johnson's jury trial rights, the district court proceeded with the trial, over petitioner's objection, while he was hospitalized for emergency heart surgery. Consequently, Johnson was not present during the case for the defense, could not confront witnesses or confer during the defense with his counsel, and could not take the stand and testify in his own defense (as he had always planned). This was constitutional error and squarely conflicts with the law in the First and the Eleventh Circuits.

A criminal defendant has the right to be "present at all stages of the trial." *Faretta v. California*, 422 U.S. 806, 820 n.15 (1975). This right is preserved by the Sixth Amendment and implicates the fair trial concerns of the Due Process Clauses of the Fifth and Fourteenth Amendments. *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). It is a right personal to the defendant and is lost only if waived, either explicitly or by the

defendant's conduct. *Allen*, 397 U.S. at 342-43; *see also*, Fed. R. Crim. P. 43.[7]

Here, petitioner's absence from the courtroom during trial was due to bypass surgery ordered by his doctor as immediately necessary to correct a life-threatening heart condition. (App. 35a) When he initially learned of his condition, Johnson, after consulting with his physician, elected non-surgical alternative treatment, so that he could attend his projected 8-week trial and testify in his own defense. (R6555; T4/6/00/p.115; T4/3/00/p.97). Through no fault of petitioner, the 8-week trial projection was not met, and 11 weeks into the trial, as the prosecution's case came to an end, Johnson's heart condition worsened and required immediate bypass surgery. *See also* note 10, *infra*. No one suggests that the surgery and subsequent hospitalization were manipulated or contrived, or that Johnson's heart bypass was not medically required to keep him alive. (App. 41a). Nor is there any disagreement that petitioner, when faced with the surgical procedure, explicitly declined to waive his right to be present for the remainder of his trial and to accept the trial judge's invitation to be tried *in absentia*. (App. 42a).

In such circumstances, the First and Eleventh Circuits have reversed federal district court decisions that refused to continue the trial of a defendant who wished to be present but who was suddenly hospitalized for emergency medical

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[7] Fed. R. Crim. P. 43, which specifies the conditions in which an ongoing trial may proceed *in absentia*, restated the law at the time of its adoption and codified both the Sixth Amendment Confrontation Clause right and the common law. *Crosby v. United States*, 506 U.S. 255, 259 (1993); *United States v. Gagnon*, 470 U.S. 522, 526 (1985).

treatment. [8] *See United States v. Latham*, 874 F.2d 852, 857-58 (1st Cir. 1989) (hospitalized defendant who voluntarily ingested potentially lethal drug overdose intended to attend trial and was not voluntarily absent); *United States v. Novaton*, 271 F.3d 968, 996-97 (11th Cir. 2001) (defendant's absence from trial while in hospital was involuntary), *cert. denied*, 122 S. Ct. 2345 (2002). It was fully acknowledged by those circuits that, had the defendant's illness been faked, *Novaton*, 271 F.3d at 997, or manipulated, *Latham*, 874 F.2d at 858, they could have made a finding of a knowing and intelligent waiver. *See United States v. Gagnon*, 470 U.S. 522, 528, (1985); *Taylor v. United States*, 414 U.S. 17, 20 (1973). But that circumstance was not present there, nor, as the Fifth Circuit correctly recognized, does it pertain here. *Edwards*, (App. 41a-42a) ("Johnson did not exploit his health condition to avoid a trial" and "he would not waive his presence").[9] That should have ended the inquiry. *See, e.g., Novaton*, 271 F.3d at 997; *Latham*, 874 F.2d at 858; *and see, United States v. Watkins*, 983 F.2d 1413, 1419-20 (7th Cir. 1993) (district court lacked sufficient basis to conclude that defendant subject to psychotic episodes had knowingly and voluntarily consented to waive right to be present).

The Fifth Circuit, however, in what it recognized as a "unique" approach (App. 39a), departed dramatically from its sister circuits. It upheld the trial judge's denial of a trial continuance during Johnson's legitimate hospitalization, not because of a knowing and intelligent waiver, but because the

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[8] This right inures even in complex cases involving multiple defendants. *See, e.g., United States v. Novaton*, 271 F.3d 968, 997 (11th Cir. 2001) (9 defendants), *cert denied*, 122 S. Ct. 2345 (2002).

[9] A defendant who exploits his right to be present so as to disrupt proceedings may be found voluntarily to have waived the right, *see Allen*, 397 U.S. at 337; Fed. R. Crim. P. 43(c), but this was not the case here.

refusal to give such a waiver was regarded by the trial judge as a "lack of cooperation," as part of "an informed trial strategy" to continue as a co-defendant in the ongoing trial, and as a "disruption" of the proceedings if it required a trial suspension. (App. 41a-42a). Such reasoning effectively eviscerates the defendant's right to demand that he not be tried *in absentia* -- and that he be allowed, as Johnson had wanted to do here, to take the stand in his own defense (R6555; T4/6/00/p.115; T4/3/00/p.97).

If, when faced with hospitalization due to genuine medical necessity, the question is not solely whether the defendant in fact refused to waive his presence at trial, as the First and Eleventh Circuits hold, but includes, as well, how his refusal is judicially perceived, the constitutional guarantee no longer depends on the voluntariness of the defendant's conduct, but on the extent to which that conduct might inconvenience the trial judge and others. Such a standard is wholly incompatible with this Court's admonition that the judiciary "must indulge every reasonable presumption against the loss of constitutional rights. . . . " *Allen*, 397 U.S. at 343 (*citing Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

It will invariably be the case in circumstances such as those presented here -- a medical emergency necessitating absence from the courtroom -- that a defendant's refusal to remove himself from the proceedings voluntarily can be regarded as uncooperative. The courts below embellished on the finding of a "lack of cooperation" by dwelling on the failure of defendant Johnson and his counsel to keep the trial judge apprised of his deteriorating condition. (App. 41a).

Even assuming that was the case[10] -- and that the defendant had some responsibility to anticipate that the trial judge desired periodic medical updates -- the substantive inquiry to be followed by the district court when confronted with circumstances such as these is no less exacting.

If the medical condition is neither manipulated nor contrived, and will cause the defendant's absence from the courtroom for an extended period of time, the sole inquiry is whether the defendant made a knowing and intelligent waiver of his right to be present. *Gagnon*, 470 U.S. at 528; *Taylor*, 414 U.S. at 20; *United States v. Crites*, 176 F.3d 1096, 1098 (8th Cir. 1999); *United States v. Nichols*, 56 F.3d 403, 417 (2d Cir. 1995); *United States v. Tortora*, 464 F.2d 1202, 1208 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972). His cooperation, or lack thereof -- whether before or after the medical condition is fully disclosed -- is irrelevant to this legal inquiry. *Novaton*, 271 F.3d at 996-96;[11] *see also*

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[10] The record shows that the alternative treatment in fact improved Johnson's condition for an extended period during the first weeks of trial, before he took a turn for the worse. (R6550). *See also*, note 14, *infra*.

[11] The Fifth Circuit misreads *Novaton* in this regard. There, the defendant's cooperation with the court was not a factor used to determine whether his absence for medical reasons was voluntary. Rather, the Eleventh Circuit pointed to the defendant's willingness to cooperate with the court, by waiving his presence during parts of the trial that did not apply to him, only as evidence that his eventual request of a continuance or mistrial was *bona fide* and made in "good faith" -- *i.e.*, it helped confirm that his medical condition was not fakery or manipulation and suggested that he was not trying to "scuttle" the trial. *Novaton*, 271 F.3d at 998 n.4. *Novaton*'s approach to this issue is fully consistent with the inquiry used by the First Circuit, *see Latham*, 874 F.2d at 858, and mandated by the language of Fed. R. Crim. P. 43(b). It provides no support for the Fifth Circuit's "unique" use of "cooperation" as a factor sufficient to override a defendant's insistence on being present at this trial where *there was no dispute* that the medical condition and hospitalization were clearly involuntary. (App. 39a, 41a).

Watkins, 983 F.2d at 1420; *Latham*, 874 F.2d at 858. The rights of trial attendance (*Faretta*, 422 U.S. at 820 n.15), to confront one's accuser (*see Crosby v. United States*, 506 U.S. 255, 259 (1993)), and to take the stand to testify in one's own defense (*Rock v. Arkansas*, 483 U.S. 44, 44-47 (1987)) are constitutionally grounded, and, once it is ascertained that a criminal defendant chooses to be present at his trial,[12] there can be no compromise of that choice no matter how uncooperative it may appear to be.[13]

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[12] The trial court and Fifth Circuit suggest that defendant Johnson's willingness before his hospitalization to allow the trial to proceed when he was not present in the courtroom is reason to discredit his insistence that the trial be suspended at the time of his heart surgery. (App. 42a). To the contrary, the choices petitioner made were constitutionally his to make, and the fact that he voluntarily absented himself from trial on prior occasions (Doc. #1704/p.3) contrast starkly with his clear refusal to waive his right to be present when facing emergency heart surgery and a lengthy recovery period. *See Novaton*, 271 F.3d at 998 n.4 (defendant's willingness to allow trial to proceed initially during periods when he was absent reflected a "cooperative" attitude, and in no way undercut the *bona fides* of his later extended absence for medical reasons or indicated a lack of cooperation because of the need for trial suspension). *See also* note 11, *supra*. Johnson clearly knew how to voluntarily waive his rights, and, when faced with the reality of an extended medical absence, he emphatically refused to be tried *in absentia*. (App. 42a).

[13] The courts below seemingly attached significance to petitioner's refusal to agree to the trial judge's offer of hospital "accommodations," such as monitoring the trial from his hospital room with a lawyer present, (App. 37a). A criminal defendant is, however, not obliged to agree to such an offer, and the law is clear that, should he decline to do so, such accommodations cannot be judicially imposed without violating his right to be present at all stages of the trial. *See United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001); *United States v. Navarro*, 169 F.3d 228, 239 (5th Cir.), *cert. denied*, 528 U.S. 845 (1999); *Valenzuela-Gonzalez v. United States Dist. Ct.*, 915 F.2d 1276, 1282 (9th Cir. 1990).

Similarly irrelevant is the fact that a defendant's refusal to waive his right to be present may be part of a trial strategy to be tried with his co-defendants. (*See* App. 42a). The constitutional inquiry is whether there was in fact a waiver, not whether it served some trial strategy. A criminal defendant can exercise his right to be present at his own trial for any reason, including a desire to be tried with the co-defendants whom the prosecution has charged in the same case. The prosecution, not the defense, decides whether criminal defendants are charged together in a single indictment, or separately. 28 U.S.C. § 547; *Wayte v. United States*, 470 U.S. 598, 607 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). If that prosecutorial determination is perceived by one defendant to serve his personal trial strategy, his insistence on being tried with the other named co-defendants in furtherance of that strategy provides no legitimate basis for a district court to override the refusal to waive his constitutional right to be present. Once it becomes clear that hospitalization is medically compelled (as here), and petitioner insists on being present at the remaining trial proceedings (essentially for presentation of the defense's case), allowing the trial of Johnson to proceed in his absence is impermissible as a matter of constitutional and federal law. *See, Novaton*, 271 F.3d at 997; *Latham*, 874 F.2d at 858; *see also, Watkins*, 983 F.2d at 1418-20.

Nor should concern over "disruption" of the proceedings if a trial suspension is ordered (App. 42a) properly weigh in the constitutional balance where, as here, the defendant's absence is *involuntary*, due to an emergency medical procedure requiring hospitalization. To be sure, other federal circuits, *upon finding the defendant's absence to be voluntary*, have inquired into whether the public interest is best served by proceeding with a trial *in absentia*. *Nichols*, 56 F.3d at 417; *United States v. Peterson*, 524 F.2d 167, 185 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976); *Tortora*,

464 F.2d at 1209. *Compare Novaton*, 271 F.3d at 995, *Latham*, 874 F.2d at 857. But the waiver issue had already been decided against the defendant in those circumstances, and thus no constitutional guarantee was implicated in the "disruption" calculation. *See, e.g., Crites*, 176 F.3d at 1098; *United States v. Pastor*, 557 F.2d 930, 938-39 (2d Cir. 1977).

The Fifth Circuit's "unique" approach collapses these necessarily separate inquiries into one, and thus allows considerations of judicial convenience to override a defendant's exercise of his constitutional right to attend his trial. Here, "trial disruption" concerns effectively trumped petitioner's insistence that the trial not proceed in his absence (*Faretta*, 422 U.S. at 820), that he be allowed to confront his accusers (*Crosby*, 506 U.S. at 259), that he be permitted to confer with counsel as witnesses testified (*see Maryland v. Craig*, 497 U.S. 836, 845-56 (1990)), and that he have the opportunity to take the stand and testify in his own defense (*Rock*, 483 U.S. at 44).

This was constitutional error. Petitioner's heart surgery was not manipulated or contrived (App. 41a-42a). In spite of his efforts to delay surgery through alternative therapy, Johnson's deteriorating heart condition, exacerbated by the stress of trial, compelled the emergency bypass surgery and lengthy recovery period that were undeniably involuntary. *See also*, note 10, *supra*.[14] The Constitution in

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[14] The Fifth Circuit finding that petitioner manipulated his medical decisions in order to serve his trial strategy illustrates the dangerously subjective nature of the inquiry used. (R6550). Had the 8 week trial prediction been accurate, petitioner's choice of an alternative treatment would have enabled him to be present physically throughout the trial. Ironically, he made this medical decision, after conferring with physicians (R6555; T4/6/00/p.115), in furtherance of his right to be present, but the district court's second-guessing of his choice of treatment was used here as grounds to find a waiver of that right. *See Pastor*, 557 F.2d at 947 (Van Graafeiland, J., dissenting) (physicians familiar with

such circumstances guarantees petitioner Johnson that, if he exercises his right to be present, he will not be tried *in absentia* (*Novaton*, 271 F.3d at 996; *Latham*, 874 F.2d at 857), and the inevitable "disruption" to the trial proceeding occasioned by his exercise of that right provides no basis for judicial compromise of the guarantees he is afforded by the Sixth Amendment, the Confrontation Clause, and the Due Process Clause. *See, e.g., Allen*, 397 U.S. at 343 (every reasonable presumption is to be indulged against the loss of constitutional rights).

The Fifth Circuit has fashioned a new standard for permitting trials *in absentia*, notwithstanding that the defendant's absence is involuntary and that he makes clear his desire to be present. By introducing into the constitutional inquiry a balancing of asserted rights against considerations of judicial economy and convenience, the decision below not only is in conflict with the First and Eleventh Circuit Courts of Appeals, but also renders a criminal defendant's jury trial protections of attendance, confrontation, legal representation, and the giving of testimony on his own behalf no longer his to exercise or waive, but simply interests for a trial judge to honor -- or not -- through a subjective assessment of the defendant's cooperation, his motives for a refusal of waiver, and considerations of trial disruption. Such an erosion of these basic rights were precisely what the Framers feared. *Apprendi*, 530 U.S. at 483. Certiorari should be granted to resolve the conflict among the federal circuits and ensure that a defendant's jury rights associated with his trial attendance are protected under the most exacting of legal standards.

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defendant's medical history were, "despite the omniscience of Federal judges, . . . better qualified that we to pass upon the necessity for [defendant's] hospitalization.")

III. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHEN A TRIAL JUDGE MAY REMOVE A DISSENTING JUROR DURING FINAL DELIBERATIONS

A further intrusion on petitioner Johnson's jury trial rights occurred with the district court's dismissal of dissenting Juror 68 during final jury deliberations. The Sixth Amendment guarantees criminal defendants an impartial and unanimous jury verdict. Any compromise of that guarantee must be based on "just cause," Fed. R. Crim. P. 23(b), which in other federal circuits requires nothing less than a showing of juror incapacity (either mental or physical) once it is clear that the removal request concerns a "hold-out" juror. In its affirmance, the Fifth Circuit, without so much as a mention of Juror 68's capacity to render a verdict, aggregated selected instances of that juror's conduct during trial -- none of which on their own was regarded by the trial judge to be disqualifying -- to uphold the district court's finding of "cause" for removal. If such a showing is all that is needed to remove a juror, upon learning that he alone has views about the trial evidence not shared by others, the door will be opened to the easy judicial manipulation of the right to an unanimous jury verdict that occurred here. Plenary review by this Court is therefore needed.

Juror 68 first came to the district court's attention during trial, when allegations that he was discussing the trial while in church were found baseless.[15] (C3/21/00/pp.2-50; C4/3/00/p.11; C4/18/00/p.10). He again became the subject of a district court inquiry when he brought a dictionary and

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[15] The petition for certiorari filed by Edwin and Stephen Edwards sets forth in more detail the facts relating to the dismissal of Juror 68.

thesaurus into the jury room during jury deliberations. As a consequence, the court instructed the jurors that they were not to bring any outside materials into their deliberations, but took no further action. (T4/25/00/pp.11-21, 24-43; T5/2/00/pp.5, 213).

On the fourth day of deliberations, Juror 68 wrote a note to the district court, expressing concern that he was "being *very* intimidated because how [sic] I may feel." (R7621 (emphasis in original)). The note mentioned "evidence" and expressed that Juror 68 had "some doubts" and felt dismissal might be in order because of his "feelings or thoughts which are seemingly to be affecting the process or the majority of feelings, of others . . . ." (R7621). Without any inquiry, the district court sent the jury back to continue with its deliberations.

Following another day of deliberations, the court received a note from other jurors stating, in part: "We feel a certain juror is biased and refuses to participate in deliberations. He has his mind made up, but will not discuss his reasoning. After many, many attempts by ALL jurors he still refuses . . . ." (R7646 (emphasis in original)). Upon speaking with the jury foreman, the court learned that Juror 68 was the subject of the note, that the deliberations were at a "stalemate," and that Juror 68 was maintaining "this is my opinion and I have got a right to it." (T5/1/00/pp.269, 273-82, 291). The jury foreman also offered his belief that Juror 68 was bringing pieces of paper into and out of the jury room. (T5/1/00/p.23).

The trial judge thereupon interviewed Juror 68 and was advised that his disagreement with his colleagues arose from his view of the evidence. Juror 68 indicated that he looked to "the evidence that we have heard" and his conscience to "help me make a decision" (T5/2/00/pp.159-

60), and further remarked that he felt intimidated and pressured because "it's my feelings and how I've chosen to vote on an issue or a charge." (T5/2/00/pp.183-84).

The district court then undertook an investigation of Juror 68, suspending deliberations and conducting four days of hearings, which included extended interrogation of Juror 68 as to whether he had brought papers into or out of the jury room, interviews of each of the other jurors in which several of them accused Juror 68 of impeding a verdict, and testimony from several members of Juror 68's church. (T5/2/00/pp.199, 202-03, 212-13, 237-38, 246-47, 255, 264-65; T5/3/00/pp.50-237; T5/4/00/pp.4-31). During these hearings, Juror 68 apparently failed at first to disclose certain incidents that had been described by other jurors of him bringing pieces of paper into or out of the jury room -- incidents he subsequently recalled and readily explained. (T5/3/00/pp.42-45). The government moved for dismissal, and, two weeks after deliberations had begun, the district court dismissed Juror 68 on grounds that he had failed to follow the court's instructions and had not been candid with the court when questioned about his conduct. (T5/5/00/pp.24-51; App. 46a).

That determination lacked sufficient justification to support a compromise of petitioner's right to an unanimous verdict by all 12 jurors. Unanimity, which is rooted in the Sixth Amendment and codified in Federal Rule of Criminal Procedure 31, is an indispensable feature of a federal jury trial. *Johnson v. Louisiana*, 406 U.S. 356, 369-70 (1972) (Powell, Jr., concurring); *see also Apodaca v. Oregon*, 406 U.S. 404 (1972). The right to an unanimous jury verdict is so central to a criminal defendant's jury right that it cannot be waived. *United States v. Gomez-Lepe*, 207 F.3d 623, 630 (9th Cir. 2000); *see also Hibdon v. United States*, 204 F.2d 834, 836 (6th Cir. 1953) (early proposal by Advisory

Committee on Criminal Rules to permit majority verdicts on parties' stipulation was criticized and withdrawn). The requirement of unanimity ensures that "no member of the jury may be ignored by the others." *Johnson*, 406 U.S. at 396 (Brennan, J., dissenting).

Typically federal verdicts are rendered by an unanimous jury of 12, although Federal Rule of Criminal Procedure 23(b) authorizes a verdict by 11 jurors when there is "just cause" for dismissing a juror. Fed. R. Crim. P. 23(b). The intended purpose of the rule was to permit dismissal of a juror during deliberations in those extreme circumstances when a juror becomes ill or is otherwise unable to continue service. Fed. R. Crim. P. 23(b) Advisory Committee Notes, 1983 Amendments. Thus, under the rule, "just cause" has been used to dismiss jurors who become unavailable, experience mental or physical illness, or are otherwise unable to render a verdict based on the evidence presented.[16]

Here, there was no question that Juror 68 was fully capable of and willing to render a verdict. Indeed, the record reflects that the government's motive behind requesting dismissal of Juror 68 was that he had firm views about the evidence, and his views differed from those of the other jurors. (T5/2/00/pp.159-60, 183-84; App. 44a-45a, 51a-52a). The district court nonetheless dismissed Juror 68 because of

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16 *See, e.g., United States v. Beard*, 161 F.3d 1190, 1193-94 (9th Cir. 1998) (jurors' argument left them emotionally unstable and unable to deliberate); *United States v. Reese*, 33 F.3d 166, 172-73 (2d Cir. 1994), *cert. denied*, 513 U.S. 1092 (1995); *United States v. Geffrard*, 87 F.3d 448, 451 (11th Cir.) (juror religious beliefs prevented juror from rendering guilty verdict), *cert. denied*, 519 U.S. 985 (1996); *United States v. Ruggiero*, 928 F.2d 1289, 1300 (2d Cir.) (juror disabled by fear from perceived threat by defendant), *cert. denied*, 502 U.S. 938 (1991); *United States v. Wilson*, 894 F.2d 1245, 1250-51 (11th Cir.) (juror illness), *cert. denied*, 497 U.S. 1029 (1990).

misconduct regarding matters unrelated to his capacity to render a verdict. (App. 46a).

Use here of Rule 23(b) to remove a deliberating juror on the basis of such misconduct -- especially a juror identified by the others as a hold-out -- is in direct conflict with the rulings of other federal circuits, with regard not only to the substantive standard to be applied in reviewing an objection to the dismissal of a hold-out juror, but also the proper inquiry to be conducted by the trial court during jury deliberations when a complaint about the refusal to deliberate arises.

The Second, Ninth, and District of Columbia Circuits have held that it is unconstitutional to discharge a juror if there is any reasonable possibility that the request for dismissal was based on the juror's views of the evidence. *See United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999); *United States v. Thomas*, 116 F.3d 606, 622 (2d Cir. 1997); *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987).[17] In these circuits, the motive behind the request for dismissal is a critical element in evaluating the propriety of a juror's dismissal. *See, e.g., Symington*, 195 F.3d at 1088 (other jurors' frustrations with dismissed juror, manifested in concerns about general capacity, arose from position on the merits of the case). Dismissal of a juror because his is the dissenting vote that is impeding an unanimous verdict of guilty violates a defendant's right to an unanimous verdict. *United States v. Smedes*, 760 F.2d 109 (6th Cir. 1985) (reversing district court which dismissed dissenting juror to obtain unanimous jury of 11).

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[17] In each of these cases, as here, complaints from other jurors alerted the court and the government to the hold-out juror's views on the merits.

Moreover, for valid and compelling constitutional reasons, these other circuits have severely limited the district court's power to interrupt the jury's deliberative process. "Once a jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important -- safeguarding the secrecy of jury deliberations." *Thomas*, 116 F.3d at 618. This Court has recognized that "[t]he integrity of jury proceedings must not be jeopardized by unauthorized invasions." *Remmer v. United States*, 347 U.S. 227, 229 (1954); *see also Tanner v. United States*, 483 U.S. 107, 120 (1987). Allowing a district court to halt jury deliberations in order to conduct a lengthy investigation of a single juror, without regard for how it might affect the deliberative process, undermines this principle. Here, Juror 68 told the district court that its repeated questioning of him had caused the other jurors to wonder what was "going on" and whether he "had been influenced." (T5/2/00/pp.166-67).

The courts of appeals have taken conflicting approaches on how to deal with a deliberating juror whose dismissal is sought. The Second, Ninth, and District of Columbia Circuits have adopted an objective standard regarding intrusion into jury deliberations. Once it becomes apparent that there is a reasonable possibility that the juror is being challenged because of his view of the evidence in the case, a district court's inquiry must cease. *See Symington*, 195 F.3d at 1087; *Thomas*, 116 F.3d at 622; *Brown*, 823 F.2d at 596. The Eleventh Circuit has adopted a more relaxed, subjective standard, which permits the district court to conduct a subjective inquiry into whether the juror in fact refuses to abide by the law. *See United States v. Abbell*, 271 F.3d 1286, 1303-04 (11th Cir. 2001), *cert. denied*, 123 S. Ct. 74 (2002). This subjective inquiry is allowed even in the face of a possibility that the juror's view of the evidence was the basis for seeking dismissal. *Id.*

Here, the Fifth Circuit rejected the approach of the Second, Ninth, and District of Columbia Circuits, on the one hand, and adopted an approach even more relaxed than that the Eleventh Circuit, on the other hand. Under the Fifth Circuit's narrow reading of *Brown*, *Thomas*, and *Symington*, the objective inquiry used in those cases would apply only when the juror whose dismissal is sought is accused of failing to follow the law. Here, Juror 68's willingness to abide by the law was not in dispute. The Fifth Circuit nonetheless reviewed the dismissal of Juror 68 under the less rigorous and more subjective "abuse of discretion" standard, and, as a consequence, found acceptable the district court's interruption of jury deliberations to investigate complaints about the dissenting juror. Observing that "most litigants . . . actively seek dismissal only of those jurors that they believe are adverse to their client's case," the Fifth Circuit determined that the government's motivation behind the request for dismissal of Juror 68 was not "in any manner controlling," notwithstanding the decisions of its sister circuits in similar cases. (App. 51a)

Further compounding its error, the Fifth Circuit upheld the district court's dismissal of Juror 68, based not at all on the Eleventh's Circuit's limited inquiry as to whether he should be dismissed for refusing to follow the law, but, instead, for his lack of candor and the failure to follow instructions about bringing unauthorized pieces of paper and books into and out of the jury room (App. 51a-52a).[18] Traditionally, such misconduct has been held not to constitute grounds for juror dismissal. *See, e.g., United*

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[18] Before the hearings conducted by the district court revealed Juror 68's views on the merits of the case, instances where Juror 68 had allegedly failed to follow instructions about bringing materials into the jury room had been brought to the district court's attention -- and prompted no action toward dismissal. (App. 43a-44a).

States v. DeLaVega, 913 F.2d 861 (11th Cir. 1990) (book on jury duty), *cert. denied*, 500 U.S. 916 (1991); *United States v. Cheyenne*, 855 F.2d 566 (8th Cir. 1988) (dictionary); *United States v. Steele*, 785 F.2d 743 (9th Cir. 1986) (dictionary). Yet, according to the court below, a district court may dismiss a juror -- even in the face of evidence that the juror wishes to acquit the defendant -- as long as the district court can identify "misconduct" by the juror, such as failing to follow technical instructions of the court.

To allow, as here, district courts at the eleventh hour to engage in a process that interrupts jury deliberations and inquires into jurors' deliberative process has incalculable effects on the impartiality of jurors. The Fifth Circuit's approach in this case contrasts markedly with that of other circuits.

> Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two evils [--] *protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity.*

Thomas, 116 F.3d at 623 (emphasis added).

The court of appeals' affirmance of the district court's dismissal order thus sanctions yet another serious interference with the jury trial rights of federal defendants. If a juror who has been identified to the court as refusing to join in an unanimous verdict for the government can be dismissed simply on a finding that the juror has failed to follow instructions not directly implicating the integrity of the deliberative process, the unanimous jury right becomes irretrievably compromised. Further, if, while investigating

alleged juror misconduct, a district court can interrupt and interfere with the deliberative process, as occurred here, the right to an impartial jury is effectively lost. To prevent the evisceration of these fundamental rights that the Fifth Circuit's decision portends, and resolve the conflict among the federal circuits, this Court should grant plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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INDEX TO APPENDIX

Constitutional and Statutory Provisions 2a

United States v. Edwards (5th Cir. Aug. 23, 2002) 5a

Denial of Petitions of Edwin Edwards, Stephen Edwards, Andrew Martin for Rehearing and Rehearing En Banc 79a

Denial of Petitions of Cecil Brown, Bobby Johnson for Rehearing and Rehearing En Banc 81a

Ruling on Bobby Johnson's Motion for Judgment of Acquittal or New Trial for Being Tried In Absentia 83a

Amended Ruling on Defendants' Motion for Judgment of Acquittal and Motion for New Trial 163a

Ruling on Defendants' Motion for Judgment of Acquittal and Motion for New Trial 165a

Ruling on Anonymous Jury Motion and Appendix A 167a

Transcript Opinion on Dismissal of Juror 68 ..... 241a

Ruling on Government's Motion for Trial of the Defendant Bobby Johnson In Absentia 274a

Liptak, Adam, Nameless Juries Are on the Rise in Crime Cases, *The New York Times*, at A1 (Nov. 18, 2002) 275a

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rule of Criminal Procedure 23(b) provides:

> (b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it

> necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

Federal Rule of Criminal Procedure 24(a) provides, in pertinent part:

> (a) Examination. The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. . . .

Federal Rule of Criminal Procedure 31(a) provides, in pertinent part:

> (a) Return. The verdict shall be unanimous . . . .

Federal Rule of Criminal Procedure 43 provides, in pertinent part:

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of

sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial) . . . .

Federal Rule of Criminal Procedure 44 provides, in pertinent part:

Rule 44. Right to and Assignment of Counsel

(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant . . . .

United States of America, Plaintiff Appellee v. Edwin Edwards, Stephen Edwards; Cecil brown; Andrew Martin; Bobby Johnson, Defendants-Appellants

No. 01-30036

United States Court Of Appeals For The Fifth Circuit

August 23, 2002, Decided

August 23, 2002, Filed

Before HIGGINBOTHAM, WIENER and BENAVIDES, Circuit Judges.

Benavides, Circuit Judge:

After a long, complex trial, the former governor of Louisiana, his son, and several of his associates were convicted for their roles in various schemes to make money from Louisiana's riverboat gambling license process by exploiting the former governor's apparent ability to influence that process. The defendants appeal their convictions for, *inter alia*, extortion, mail and wire fraud, money laundering, making false statements, and RICO violations. Finding no reversible error, we affirm.

I.

Edwin Edwards was a prominent figure in Louisiana politics for more than two decades. After serving in the Navy during World War II and later obtaining his law degree, he spent several years in private practice and local politics. He served as a member of the United States House of Representatives from 1965 until 1972, when he was elected to the first of two consecutive terms as Governor. In 1980, he left the governor's office and served briefly on the

Louisiana Supreme Court. He then returned to private practice until 1984, when he was elected to a third term as Governor. After two federal corruption trials in 1985 and 1986, resulting in a hung jury and an acquittal, respectively, he lost his bid for re-election in 1987. In 1992, however, the voters sent him back to the Governor's office for an unprecedented fourth term. When that term ended in 1996, he once again returned to private practice. In private practice, he worked closely with his son, Stephen Edwards, who is also a lawyer.

Stephen and Edwin Edwards were convicted with several of the Governor's associates. Cecil Brown ("Brown"), an auctioneer and businessman, held the title of "Special Assistant to the Governor." Andrew Martin ("Martin") was a businessman who worked in the commercial fishing and marine towing industries, along with serving as a public official on state commissions. From 1992 to 1995, Martin held the title of Executive Assistant to the Governor. Bobby Johnson ("Johnson"), a self-made cement magnate, was a close friend of Edwin Edwards. In addition to these convicted defendants, two of Edwin Edwards' associates were acquitted: Gregory Tarver ("Tarver"), a Louisiana State Senator and Ecotry Fuller ("Fuller"), a former member of the Louisiana Gaming Control Board ("the Board").

Originally, these seven men were indicted en masse. The government alleged that each was a member of a conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The indictment broke the conspiracy into five separate schemes. Pursuant to each scheme, the conspirators were alleged to have extorted money from various individuals who sought approval of riverboat casino projects. The conspirators promised to help these individuals obtain licenses in exchange for money and

threatened to make obtaining the licenses impossible if they did not pay.[1] It was further alleged that the conspirators attempted to launder the money obtained through the schemes.

Brown was the major player in the LRGC/NORC Scheme. Brown, ostensibly representing Edwin Edwards (who was acquitted of all acts relating to this scheme), defrauded and extorted the Louisiana Riverboat Gaming Corporation ("LRGC") and the New Orleans Riverboat Corporation ("NORC") (controlled by the same principals) by promising each a riverboat license if they paid exorbitant consulting fees despite the fact that he knew that LRGC and NORC would not receive licenses. Brown spoke with LRGC/NORC principals between the Fall of 1991 and the Summer of 1993, when the key licensing vote occurred. During that period, Brown was paid approximately $350,000.

Brown and Johnson carried out the Jazz Scheme. Claiming to represent Edwin Edwards, they extorted Jazz Enterprises, Inc. ("Jazz"), one of three applicants for two available Baton Rouge riverboat licenses. Brown and

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[1] In 1992 the Louisiana Riverboat Gaming Commission was created to evaluate applicants for fifteen riverboat gaming licenses available in Louisiana. The Commission was made up of seven panel members, each of whom was appointed by Edwin Edwards. By 1993, it had awarded all fifteen certificates of preliminary approval. The Commission did not have authority to issue the licenses, as it only determined whether the applicant was acceptable. Nevertheless, fourteen of the fifteen applicants awarded preliminary approval were granted licenses by the Louisiana State Police, Riverboat Gaming Division. In 1996, the Commission was replaced by the Louisiana Gaming Control Board, made up of six members appointed by Governor Mike Foster. The Board awarded the final certificate of preliminary approval. The appellants' extortion demands were based on their actual or apparent ability to manipulate the votes of these two entities.

Johnson spoke with the Jazz principals between February 1994 and August 1994. Jazz did not agree to the extortion demand, but it received a license anyway in July 1994. Edwin Edwards was ultimately acquitted on all counts relating to this scheme.

Stephen Edwards, his friend Richard Shetler ("Shetler") and Edwin Edwards were the major players in the Players Scheme. Stephen Edwards, representing his father, extorted Players Casino ("Players"), demanding that it retain him as a lawyer and hire his merchandising firm and Shetler as consultants to obtain a license and receive other benefits. Stephen Edwards spoke with Players between May 1993 and approximately February 1995. During this time, Players paid Shetler and Stephen Edwards more than a million dollars.

The primary participants in the Treasure Chest Scheme included Martin, Edwin Edwards, and Stephen Edwards. Martin, representing the Governor, extorted Robert Guidry ("Guidry"), who was a principal of the Treasure Chest Casino. Martin was in contact with Guidry between April 1994 and April 1997. Over these years, Guidry paid Stephen Edwards, Edwin Edwards, and Martin more than a million dollars.

The 15th Riverboat License Scheme, so named because it was the final license to be awarded by the Board, was a father-son operation. Stephen Edwards and Edwin Edwards extorted Eddie DeBartolo, Jr. ("DeBartolo") and his business partner, Ed Muransky. DeBartolo, the then-owner of the San Francisco 49ers professional football team, was seeking a riverboat license pursuant to a joint venture between his company, DeBartolo Entertainment Corporation, and Hollywood Casino. Edwin Edwards and Stephen Edwards were in contact with DeBartolo between September 1996 and April 1997. DeBartolo made a one-time $400,000

payment to Edwin Edwards and Stephen Edwards in March 1997.

On August 4, 1999, a grand jury returned a 34-count superseding indictment, charging appellants Edwin Edwards, Stephen Edwards, Martin, Johnson and Brown with a violation of RICO [18 U.S.C. § 1961 et seq.], conspiracy to violate RICO [18 U.S.C. § 1962(d)], mail and wire fraud [18 U.S.C. § 1341 et seq.], extortion [18 U.S.C. § 1951], money laundering [18 U.S.C § 1956], interstate travel and communication in aid of racketeering [18 U.S.C. § 1952] and false statements [18 U.S.C. § 1001].

The case was tried to a jury, and the appellants were convicted as follows: Edwin Edwards [Counts 1-2 (RICO), 12-15 (Players extortion), 17-19 (Treasure Chest extortion), 20-22 (15th Riverboat License fraud), 25-27 (15th Riverboat License fraud), 31 (15th Riverboat License extortion) and 34 (money laundering)]; Stephen Edwards [1-2, 12-15, 16 (Interstate Travel in Aid of Racketeering) 17-19, 20-22, 25-27, 31 and 34]; Martin [1-2, 17-19 and 34] Brown [1-2 and 3-4 (Jazz extortion)]; and Johnson [3-4, 5 (Interstate Communication in Aid of Racketeering), 6 (fraud), and 7 -11 (false statements)]. Subsequent to the verdict, the Supreme Court decided *Cleveland v. United States*, 531 U.S. 12 (2000), holding that mail and wire fraud convictions cannot be based on the theory that the government was defrauded of its intangible right to issue licenses (hereinafter, "license as property theory"). In light of *Cleveland*, the district court granted new trials as follows: Edwin Edwards [Counts 20-22 and 25-27]; Stephen Edwards [20-22 and 25-27]; and Johnson [6].

In the process of trying this case, the district court made a number of rulings that are now challenged. Specifically, the appellants contend that: (1) the district

court erred by empaneling an anonymous jury; (2) the district court erred when it admitted evidence obtained via unauthorized wiretaps; (3) the district court erred when it admitted hearsay evidence pursuant to Fed. R. Evid. 801(d)(2)(E); (4) the district court erred when it ordered Johnson tried in absentia; (5) the district court erred when it dismissed Juror #68 during deliberations; (6) the evidence at trial was insufficient to support all Brown and Johnson's convictions as well as Stephen Edwards's extortion conviction relating to the 15th Riverboat License Scheme; (7) the spillover effect from the counts based on the *Cleveland*-repudiated "license as property" theory requires reversal of appellants' convictions on some or all of the other counts; (8) Stephen Edwards' sentence should be vacated because the calculation of the extortion payments was overstated; and (9) Johnson's sentence should be vacated because the calculation of the extortion payments was overstated and because the evidence did not support an adjustment for obstruction of justice; (10) the restitution award against Martin should be set aside because it was not supported by the jury verdict; and (11) various aspects of their trial violated their due process rights. We address each contention in turn.

II.

Aware of the intense media, political, and emotional atmosphere surrounding this case, the district court withheld certain identifying information about potential jury members. This omitted information included their names and places of employment. Regarding the potential jurors' residential information, the district court released their zip codes and parishes, but withheld the exact addresses. Despite the lack of access to this information, the parties were able to view a large amount of other information about the venirepersons, including a twenty-eight page questionnaire consisting of 116

questions, some with subparts. Moreover, they were allowed to propose questions for potential jury members and ask follow-up questions. The defendants contend that by withholding some juror information, the district court violated their right to a fair trial before an impartial jury. Additionally, they argue that this injury was exacerbated by the district court's decision to close the proceedings it held to determine whether to withhold juror information. The closure of these proceedings, the defendants contend, violated their Sixth Amendment right to a public trial.

A.

We have previously recognized the seriousness of the decision to withhold juror information, holding that it should be a last resort in a court's efforts to protect the jurors from intimidating or prejudicial influences. *See United States v. Krout*, 66 F.3d 1420, 1427 (5th Cir. 1995). This interest in juror protection must be balanced against the defendant's interest in effective voir dire and the presumption of innocence. *See id.* The decision to empanel an anonymous jury is within the discretion of the district court. *United States v. Sanchez*, 74 F.3d 562, 564 (5th Cir. 1996). Factors that may support a district court's decision include:

(1) the defendants' involvement in organized crime;
(2) the defendants' participation in a group with the capacity to harm jurors;
(3) the defendants' past attempts to interfere with the judicial process or witnesses;
(4) the potential that, if convicted, the defendants will suffer a lengthy incarceration and substantial monetary penalties; and
(5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.

Krout, 66 F.3d at 1427. Although the district court must base its decision on "more than mere allegations or inferences of potential risk[,]" *id.*, it may consider the indictment and affidavits submitted by the parties. *See United States v. Wilson*, 160 F.3d 732, 747 (D.C. Cir. 1998) (relying on indictment and prosecutor's affidavit); *Krout*, 66 F.3d at 1427 (relying on unsworn affidavit). In view of the totality of the circumstances, the district court must "make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceeding." *United States v. Branch*, 91 F.3d 699, 723-24 (5th Cir. 1996) (quoting *United States v. Childress*, 58 F.3d 593, 702 (D.C. Cir. 1995)). We will not find an abuse of discretion if the "evidence at trial supports the conclusion that anonymity was warranted." *Krout*, 66 F.3d at 1427.

As the *Krout* factors suggest, the paradigmatic situation justifying an anonymous jury is an organized crime trial, where the safety of the jurors becomes an overriding concern. *See, e.g., United States v. Salvatore*, 110 F.3d 1131, 1143-44 (5th Cir. 1997) (upholding anonymous jury in case involving organized crime defendants), *overruled on other grounds by Cleveland*, 531 U.S. 12 (2000); *Krout*, 66 F.3d at 1427 (upholding anonymous jury in prosecution of member of Texas "Mexican Mafia"). This is not to say, however, that the withholding of juror information is appropriate only in organized crime cases. We have previously approved of an anonymous jury when the case attracts unusually large media attention and arouses deep passions in the community. In the *Branch* case, we affirmed the district court's decision to withhold certain identifying juror information in the trial of former members of the Branch Davidian sect. Cautioning that "[n]ot all celebrated trials merit an anonymous jury," we nevertheless relied on the intense press coverage and the passions that the trial incited, even though there was no

indication that any of the defendants would interfere with the jurors. *Branch*, 91 F.3d at 723-24. In this respect, the present case closely resembles *Branch*. The overriding concern, and the most important factor in the district court's analysis, was the intense media interest and highly charged emotional and political fervor that surrounded the trial. Edwin Edwards was a four-term governor who, partly because of his previous legal entanglements, was a polarizing figure in Louisiana politics. His son, Stephen Edwards, had attracted intense media coverage. Tarver was a Louisiana state senator. In addition to these high profile defendants, several well known witnesses would testify at trial, including DeBartolo, the owner of the Super Bowl Champion San Francisco 49ers, and Cleo Fields, a state senator and former United States Congressman.

Moreover, the district court did not base its decision on publicity alone. There were several allegations and examples of attempts to interfere with the judicial process and witnesses. The indictment charged Edwin Edwards and Stephen Edwards with the illegal wiretapping and countersurveillance of an FBI agent.[2] In a related trial, Edwin Edwards was accused of witness tampering,[3] and the government filed an affidavit accusing Edwin Edwards of using a state trooper to run records searches on certain persons during his previous criminal trials. Furthermore, the present case involved his efforts to corrupt the state's process for licensing riverboat gambling.

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[2] A co-defendant, Dempsey White, pled guilty to a related charge, but the wiretap charge against Edwin Edwards and Stephen Edwards was later severed from the rest of the case.

[3] Edwin Edwards was ultimately acquitted of this charge on October 11, 2000.

In addition to these indications of the defendants' disregard for proper administrative and judicial processes, the remaining *Krout* factors also support the district court's decision to withhold juror information. The defendants all faced long periods of incarceration and significant prison sentences if convicted on all charges. Edwin Edwards alone faced a maximum of 375 years in prison and a fine of over $7,500,000. Furthermore, the district court was concerned with the possibility that persons not directly involved with the case would engage in juror intimidation or harassment. Intrepid members of the media, for example, published the identity of a juror when it was discovered. They also attempted to identify jurors by determining where they were parked and obtaining their license plate information. Moreover, Edwin Edwards had numerous close political operatives and allies who also might have attempted to influence the jurors. The prospect of such interference from the media and politically interested third parties militates in favor of withholding juror information.

In assessing the reasonableness of the balance that the district court struck between the defendants' rights and the protection of the jurors, we also note that the information withheld from the parties was limited. In referring to such juries as "anonymous," we have previously cautioned against "painting with too broad a brush." *Branch*, 91 F.3d at 723. As in *Branch*, the jury here was "anonymous" only "in the most literal sense." *Id.* The parties had access to the jurors' zip codes, parishes, and the extensive information contained in the long questionnaire. With this information, the defendants are hard-pressed in demonstrating that they were prejudiced in any way during voir dire. They point to Juror 370, who had indicated on a questionnaire that she knew Stephen Edwards' wife's mother and grandmother "all her life." A post-trial investigation allegedly revealed that she had made negative statements about Edwin Edwards in the

past. While recognizing that the withholding of juror information naturally invites this type of problem, we cannot find any real prejudice related to the empaneling of Juror 370. Her connection to Stephen Edwards was tenuous, and there is no indication that this connection biased her against the defendants.

Finally, we do not overlook the fact that the district court minimized the possibility of any prejudice to the defendants by giving an explanatory jury instruction, which was similar to the instruction upheld in *Branch*. *See id.* at 724 (noting that the trial judge in that case had explained the anonymity procedures as a response to intense trial publicity, polled the jury for any bias, and reaffirmed that the defendants were entitled to a presumption of innocence). This instruction referred to the intense media publicity as the reason for anonymity and gave no indication that the jurors should fear for their safety from the defendants. It reiterated that the defendants were presumed innocent until proven guilty and that the district court was using these procedures to protect juror privacy and ensure a fair trial for both sides. The district court then questioned the jurors to determine whether they had any bias toward either party as a result of the decision to withhold their names. All jurors assured the district court that they did not harbor any such bias. Accordingly, in light of the weighty reasons for concealing juror information, the limited scope of the concealment, and the district court's careful efforts to avoid prejudicing the defendants, we find no abuse of discretion.[4]

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[4] Martin argues that even if the district court was justified in withholding information from some defendants, those justifications do not apply to him. This argument suffers from several flaws. First, the district court explicitly stated that there was direct evidence to justify an anonymous jury in the cases of Edwin Edwards, Stephen Edwards, and Martin. *See United States v. Edwards*, 119 F.Supp.2d 589, 603 n.76 (M.D. La. 2000).

B.

The defendants also contend that the district court's decision to close the hearing on whether to empanel an anonymous jury violated their Sixth Amendment right to a public trial. Their opposition to the closure represented a reversal of strategy. Initially, they had argued that the proceedings should not be public. Once damaging information appeared in the media, however, they began to worry about public speculation that Edwin Edwards had ties to organized crime. As a result of this concern, they changed their minds and unsuccessfully attempted to open the proceedings.

At the outset, we note that we have already approved the closure of voir dire proceedings in a related case, in which Edwin Edwards was also a defendant. *See United States v. Brown*, 250 F.3d 907, 922 (5th Cir. 2001). Although *Brown* involved a First Amendment challenge to the closure of the voir dire proceedings, this distinction does not change our analysis. The caselaw applying the Sixth Amendment guarantee of a public trial was originally developed in cases involving the right of the public and press to attend trials, which is implicit in the First Amendment. *See Ayala v. Speckard*, 131 F.3d 62, 68-69 (2d Cir. 1997) (en banc); *see also Press-Enterprise Co. v. Superior Court*, 464

Regarding Martin, the district court pointed to a phone conversation in which Martin claimed that he had a transcript of a wiretap and that he had received it from a "friend of a friend of a friend," chuckling afterward. Although Martin claims that this transcript was publicly available, his comments during the conversation suggest something short of reverence for the judicial process. Second, even if there were no evidence of jury tampering or disregard for the judicial process, *Branch* clearly stands for the proposition that if other factors such as media interest are strong enough, an anonymous jury can be appropriate. *See Branch*, 91 F.3d at 724. We therefore conclude that the district court did not abuse its discretion by withholding juror information from Martin.

U.S. 501 (1984) (discussing press access to voir dire); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (discussing press access to trial and preliminary hearing); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (discussing press access to trial). In *Waller v. Georgia*, 467 U.S. 39 (1984), the Supreme Court applied these standards in the Sixth Amendment context, holding that the closure of a suppression hearing may violate the defendant's right to a public trial. *Id.* at 47 ("In sum, we hold that under the Sixth Amendment, any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press-Enterprise* and its predecessors."). In doing so, the Court articulated the following test for determining whether the closure of a proceeding violates the Sixth Amendment:

> (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;
>
> (2) the closure must be no broader than necessary to protect that interest;
>
> (3) the trial court must consider reasonable alternatives to closing the proceeding; and
>
> (4) it must make findings adequate to support the closure.

Id. at 48. Subsequent to *Waller*, the Court refined the first factor of this test, requiring a "substantial interest." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14 (1986).

We must first determine whether *Waller* applies to the proceedings at issue in this case. In *United States v. Norris*, 780 F.2d 1207, 1210-11 (5th Cir. 1986), we refused to extend that test to a bench conference about the

admissibility of a particular piece of evidence. We distinguished full suppression hearings, like the one considered in *Waller*, on the grounds that they often resemble a mini-trial and commonly determine the outcome of the prosecution. *Id.* at 1210. Because suppression hearings feature witnesses and involve an attack on the police and prosecutors, there is a vital public role in discouraging perjury and assuring that the government comports itself responsibly. *Id.* By contrast, legal arguments over relatively routine administrative matters do not implicate such concerns. *Id.* Although it is impossible to characterize the proceedings regarding the district court's decision on whether to withhold juror information as outcome determinative, we do see an important public role that counsels in favor of applying the *Waller* test. Like the suppression hearing, such proceedings involve an attack on the prosecution, specifically its accusations that the defendants constitute a threat to the integrity of the jury. Therefore, the argument that the presence of the public discourages perjury and encourages prosecutorial responsibility applies with some force to the anonymous jury proceedings. Accordingly, we decline to hold that the closure of such proceedings can *never* violate the Sixth Amendment.

This is not to say, however, that the proceedings always must be conducted in public. Rather, the *Waller* test recognizes that a limited closure of proceedings can serve a substantial institutional interest without violating the Sixth Amendment. Indeed, the interest in avoiding prejudice in the jury pool may be particularly compelling in situations like these. Because these proceedings are not full trials, there is often a limited chance for the defendant to properly contextualize or fully attack what are often mere allegations. As in the present case, the district court often will be relying in part on affidavit, accusation, and suggestion. In the absence of a full, critical evaluation and cross-examination,

such raw allegations could make their way into the public discourse, thereby proving highly prejudicial to the defendant.

The defendants argue that the district court was not motivated by this interest in a fair trial for them, but rather closed the proceedings to protect the government. The record does not support this contention. The district court did worry about the association of "inaccurate motives with the government's motion," but its concern was clearly with the fairness of the impending trial and, in particular, the prejudicial effect of such public speculation on the defendants. Moreover, in case any doubt surrounded the district court's motives, it summed up its core concern: "The overall effect of conducting a public hearing on the motion would be just the harm the Fifth Circuit warns against: an unfair trial for the defendants." We therefore conclude that a substantial interest supported the district court's decision to hold nonpublic proceedings on the motion for an anonymous jury.

We also conclude that the district court's action was no broader than necessary, as the defendants have proposed no viable alternatives to closure. They propose that the district court should not have worried about the possible taint of the jury pool because any tainted potential jurors could have be [sic] removed during voir dire. Acknowledging the potential prejudicial effect of accusations about the defendants' alleged threat to juror integrity, however, we decline to require district courts to wait until voir dire to remedy any taint. Rather, we preserve the district court's ability, when necessary, to act prophylactically to avoid the problem. Accordingly, we hold that the closure of the proceedings surrounding the anonymous jury did not violate the Sixth Amendment guarantee of a public trial.

III.

At trial, the government relied in part on evidence obtained from the electronic surveillance of Cecil Brown's phones and Stephen Edwards' office. This surveillance began after the government was approached by an informant, Pat Graham ("Graham"). Based on information provided by Graham, the government filed an application to wiretap Brown's home and office phones. The information it learned from this surveillance led to the wiretap of Edwin Edwards' home. Eventually, the government also placed bugs, video cameras, and wiretaps in the offices of Edwin Edwards and Stephen Edwards. The defendants now challenge this surveillance. Their primary argument is that the original authorization for the Brown wiretap was improper because the FBI affidavit in support of the application was based on misleading information. This argument has already been considered and rejected by another panel of this Court in *United States v. Cecil Brown*, 2002 WL 1495898 (5th Cir. July 15, 2002). Upon our own review, we also find no merit in the defendants' arguments on this issue. In addition, Brown contends that the district court erroneously admitted intercepted communications between him and his civil attorneys in violation of the attorney-client privilege. Finally, Stephen Edwards argues that the government was not authorized to monitor his conversations with listening devices placed in his office.

A.

Brown contends that the district court erred in admitting wiretap intercepted conversations in violation of the attorney-client privilege. The conversations in question included several discussions, which at times involved Brown, his attorneys, Kenneth Pitre ("Pitre") and Robert J. Lenze ("Lenze"), and Edwin Edwards. They relate to lawsuits

brought by principals of LRGC/NORC for the return of money extorted by Brown. In an October 21, 1996 conversation, Brown, Edwin Edwards, and Pitre discussed the possible characterization of the extortion money paid to Brown as a loan rather than income because "we are not ever going to admit that this is a payment to him because then we'd owe income taxes on it." They then discussed the failure of LRGC/NORC to obtain a license, with Edwin Edwards stating that "Cecil can take the position that he did what was asked," and Brown responding "I carried the water to the right places."[5] Edwin Edwards then opined that they needed someone to testify that LRGC/NORC was not awarded a license because "they were not strong enough financially." This explanation covered up the true reason for LRGC/NORC's lack of success, as articulated by Brown: "the Governor has too many friends." In a separate conversation, Brown told his attorney that the handling of the LRGC/NORC payments could not be exposed "openly in court" because with that money he had to "take care" of a "guy on the [Gaming] Board; and because we were throwing money around like crazy."

The attorney-client privilege, the oldest and most venerated of the common law privileges of confidential communications, serves important interests in our judicial system. *See Upjohn Co. v. United States*, 449 U.S. 383, 389

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[5] Brown also argues that the district court abused its discretion when it allowed a career FBI agent to testify that, in light of his experience, he believed that "carry the water" referred to the paying off of public officials. He contends that this was an expert opinion, but was never noticed or qualified for such purposes. This argument is without merit. We have previously found it acceptable for a lay witness to "draw straightforward conclusions from observations informed by his own experience." *United States v. Riddle*, 103 F.3d 423, 429 (5th Cir. 1997). As the FBI agent's testimony merely represented his own informed opinion, the district court did not abuse its discretion in allowing it.

(1981). Nevertheless, despite its venerated position, the privilege is not absolute and is subject to several exceptions. Under the crime-fraud exception to the attorney-client privilege, the privilege can be overcome "where communication or work product is intended 'to further continuing or future criminal or fraudulent activity.'" *In re Grand Jury Subpoena*, 220 F.3d 406, 410 (5th Cir. 2000) (quoting *United States v. Dyer*, 722 F.2d 174, 177 (5th Cir. 1983)). The government, as the proponent of the otherwise privileged evidence, "has the burden of establishing a prima facie case that the attorney-client relationship was intended to further criminal or fraudulent activity." *Id.* at 410. The district court agreed that the crime-fraud exception applied to these attorney-client communications, as Brown was using his lawyer's services to cover up crimes related to his extortion of LRGC/NORC. Because the application of the attorney-client privilege is a fact question to be determined in light of the purpose of the privilege and guided by judicial precedents, we review the district court's finding for clear error only. *United States v. Aucoin*, 964 F.2d 1492, 1498 (5th Cir. 1992).

In determining whether the crime-fraud exception applies, we focus on the client's purpose in seeking legal advice. *In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994) (per curiam). Brown relies heavily on the fact that the lawsuits that he hired Pitre and Lenze to defend did not allege any fraud or other crimes. He further contends that the communications are privileged because they relate only to a defense against allegations of past wrongs, not continuing or future crimes. The district court agreed with the findings of Judge John V. Parker of the Middle District of Louisiana, who determined that (1) the payments at issue in the lawsuits were made to Brown in exchange for his guarantee of obtaining riverboat licenses for LRGC/NORC through means of bribery and fraud and (2) Brown subsequently sought legal

services to conceal and cover up the crimes committed with respect to the payments. We cannot conclude that these findings were clearly erroneous. Rather than merely defending himself against civil actions alleging past wrongdoing, Brown was actively continuing the cover-up of his extortion and perpetuating his tax fraud. *Cf. Dyer*, 722 F.2d at 177-78 (holding that a defendant's use of a civil attorney to obtain a false exculpatory letter was not privileged under the crime-fraud exception). Accordingly, we find no abuse of discretion in the admission of the communications between Brown and his attorney.

B.

The information it learned from consensual recordings and covert surveillance of Brown and others led the government to seek permission to increase its monitoring of Edwin Edwards and his associates. On December 6, 1996, the government obtained an authorization order to intercept oral communications "at the premises known as the law office of Edward [sic] W. Edwards located at 4621 Jamestown Avenue." The named interceptees included Edwin Edwards, Brown, Richard L. Stalder, Pitre, Marion D. Edwards, and Wanda Edwards. Pursuant to this authorization order, the government placed listening devices in the personal office of Stephen Edwards and intercepted at least two of his conversations. The defendants contend that these actions exceeded the scope of the December 6 order in two ways. First, the government was not allowed to place monitoring devices in the office of Stephen Edwards. Second, even assuming *arguendo* that the order permitted the placement of devices in Stephen Edwards' office, it did not provide for the interception of his conversations because he was not a named interceptee. The district court rejected these arguments. We review its interpretation of the December 6 order de novo. *See United States v. Smith*, 273 F.3d 629, 632

(5th Cir. 2001) (legal conclusions on motion to suppress reviewed de novo); *United States v. Reyna*, 218 F.3d 1108, 1110 (9th Cir. 2000) (wiretap suppression reviewed de novo).

Certainly, the defendants are correct in noting that the December 6 order does not explicitly refer to Stephen Edwards' personal office. This omission, however, does not end the inquiry, as we must still determine whether the placement of devices in Stephen Edwards' office was justified under the order's reference to "the premises known as the law office" of Edwin Edwards. Central to the resolution of this issue is the definition of "the premises known as the law office," specifically, whether it referred to the entire group of legal offices at 4621 Jamestown Avenue or merely to Edwin Edwards' personal office within the suite. Because it is not clear from the face of the order how expansive that term was intended to be, it is helpful to consult the affidavit and application upon which the order was based.[6] A reading of the detailed, sixty-seven page affidavit submitted by FBI Special Agent Geoffrey C. Santini supports an expansive interpretation of "the premises known as the law office." The affidavit states, in part:

> On December 3, 1996, a separate cooperating witness (CW-3) advised that if an individual entered the front door of the law office and

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[6] The defendants object to our consideration of the affidavit, noting that the affidavit was not physically connected to the order or even referenced in it. *See United States v. Dahlman*, 13 F.3d 1391, 1395 (10th Cir. 1993) (refusing to expand scope of warrant based on affidavit where the affidavit was not physically attached to the warrant or referenced in it). There is a difference, however, in resorting to the affidavit to resolve an ambiguity and relying on it to expand an otherwise clear term in the order. Because our inquiry is limited to the former, we reject the defendants' argument that the affidavit is irrelevant.

> turned right at the reception desk, the first office on the right as one proceeded down the hall is the personal office of Stephen R. Edwards. The next office on the right down the hall is the personal office of Edwin W. Edwards. (Affiant asserts that Edwin W. Edwards' office is located in the front corner of the law office). CW-3 advised that Edwin W. Edwards currently conducts business in his personal office and on occasion in the office of Stephen R. Edwards.

As this passage suggests, there is a difference in usage between the terms "law office" and "personal office." This distinction is further supported by an attachment to the affidavit, which diagrams the layout of the entire office. The attachment indicates that although Edwin Edwards and Stephen Edwards had separate personal offices, the entire group of offices comprised a single, cohesive office area. There was a common reception desk, library, conference room, clerical/secretary area, and coffee area. Finally, the affidavit stated that, according to a cooperating witness, Edwin Edwards "would in effect use the entire office for meetings and on many occasions the CW would meet and observe [Edwin] Edwards in Stephen R. Edwards [sic] office." Our review of the affidavit, therefore, clarifies that the December 6 order's reference to the law office of Edwin Edwards includes the entire group of legal offices at 4621 Jamestown Avenue, not merely the personal office of Edwin Edwards.[7] Accordingly, we agree with the district court that

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[7] In interpreting the terms of the December 6 order, we ultimately place little weight on the government's decision on April 16, 1997 to include a specific reference to the "law office" of Stephen Edwards in its application for an extension and modification of the authorization order. The defendants argue that the explicit reference to Stephen Edwards' law office in the April 1997 application is a tacit admission that the

the order permitted the government to place listening devices in the personal office of Stephen Edwards.

The defendants further contend that even if the listening devices were properly placed in Stephen Edwards' office, the government was not permitted to listen to his conversations because he was not a named interceptee. In particular, two conversations are at issue. The first conversation, which took place on December 19, 1996, involved Edwin Edwards and Stephen Edwards discussing how to write checks so that they could disguise the criminal proceeds. The next day, the government intercepted a second conversation featuring Stephen Edwards talking with Wanda Edwards, Marion Edwards, and Cecil Brown, all three of whom were named interceptees. Again, it is beyond dispute that Stephen Edwards is not among the named interceptees in the December 6 order, and that he was not added to that list until January 15, 1997, when the first thirty-day extension was granted. The order, however, does not limit its scope to named interceptees only. Instead, it provides that interception may take place only when

> one of the named interceptees are [sic] within the target premises and are engaged in conversation or activity with any named or known coconspirator or any other individual that was caused to go to the target premises by

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government did not previously have the authority to monitor his office. We think the reliance on the April 1997 application is misplaced. The issue in determining the proper scope of the December 6 order's reference to the law office of Edwin Edwards is what the issuing court intended by the use of the term "law office." As such, we consulted the December 6 affidavit on which it relied. By contrast, the government's intent in changing the language of its April 1997 application is, at best, of marginal relevance to our analysis of the court's use of the term "the premises known as the law office" in the December 6 order.

> a named interceptee or named or known coconspirator as related to the criminal offenses as set forth in paragraph A.

The government contends, and the district court agreed, that the interception of Stephen Edwards' conversations was appropriate because he was a coconspirator, as evidenced by the December 19 and 20 conversations. It further relied on the fact that the government kept the issuing court fully abreast of the monitoring through a December 27, 1996 status report. Therefore, it argues, the interception of these conversations was fully authorized.

We do not reach the same conclusion. As the government concedes, because Stephen Edwards was not a named interceptee, the interception could be legal only if he was a "named or known coconspirator." Contrary to the government's suggestion, however, our focus in determining whether Stephen Edwards was a coconspirator must be on December 6, not on the dates of the intercepted conversations. Relying on the content of the actual conversations to justify post hoc otherwise illegal interception would constitute impermissible bootstrapping. If the interception was not legal when the conversation began, it does not become legal simply because of what the participants discussed. We must therefore look instead for evidence that the government knew that Stephen Edwards was a coconspirator on December 6. Not only does the government fail to identify any such evidence, the clear terms of its December 6 application and affidavit suggest that none exists. As of December 6, the government was aware that Stephen Edwards maintained an office at the target premises and that Edwin Edwards often used that office to conduct business. Nevertheless, there is no indication in the affidavit that the government thought that Stephen Edwards was involved in the alleged extortion schemes. By contrast,

other members of the Edwards family who had offices at the target premises, such as Wanda Edwards and Marion Edwards, were suspected of illegalities and therefore were listed as named interceptees. In other words, our reading of the December 6 order, application, and affidavit leads us to the conclusion that Stephen Edwards was not listed as a named interceptee precisely because the government did not think he was a coconspirator. Accordingly, because we conclude that Stephen Edwards was not a "named or known coconspirator" under the terms of the December 6 order, we hold that the December 19 and 20 conversations were illegally recorded and should have been suppressed. *See* 18 U.S.C. § 2518(10)(a) (providing for suppression remedy).

Having determined that the district court's admission of the December 19 and 20 conversations involving Stephen Edwards was erroneous, we now must decide whether that error was harmless. To the extent that the error implicates Stephen Edwards' Fourth Amendment rights, we ask whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder v. United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman v. Cal.*, 386 U.S. 18, 24 (1967)). There is no dispute that the suppression of the December 19 and 20 conversations alone would not have made a difference in the verdict, as the evidence of the defendants' guilt was overwhelming. Rather, the defendants suggest that the evidence obtained from the December 19 and 20 conversations provided the basis for the inclusion of Stephen Edwards as one of the named interceptees on the January 15, 1997 wiretap application. Moreover, they contend that the conversations also led to the April 1997 search of Stephen Edwards' home. These arguments overstate the importance of the illegal interception. In its affidavit in support of its application for the January 15, 1997 wiretap authorization, the government detailed a January 9, 1997 conversation

between Edwin Edwards and Martin. The two men discussed Stephen Edwards', role in the Treasure Chest Scheme, including a payment from Guidry to Stephen Edwards. Based on this evidence of Stephen Edwards' involvement in the extortion scheme, there was a solid basis for adding Stephen Edwards as a named interceptee on January 15, even without the December 19 and 20 conversations. After receiving the January 15 wiretap authorization, the government amassed extensive evidence of Stephen Edwards' criminal activities to support its subsequent April 1997 application for a search warrant. In light of this evidence, which was wholly independent of the December 19 and 20 conversations, we hold that the admission of the illegal interceptions was harmless beyond a reasonable doubt.[8]

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[8] The defendants also argue that they were entitled to a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). They do not, however, explain why such a hearing was necessary, except to assert in passing that there was no probable cause to support the placement of listening devices in the office of Stephen Edwards. This argument has no merit. The government had ample evidence from its cooperating witnesses that Edwin Edwards was using the entire law office, including Stephen Edwards' personal office, to carry out illegal activities. Moreover, because we do not interpret the December 6 order to authorize the interception of Stephen Edwards' conversations, we need not determine whether there would have been probable cause to do so. Therefore, we conclude that there was no deficit of probable cause in support of the December 6 order. To the extent that the defendants argue that they were entitled to a *Franks* hearing on another issue, such as the probable cause supporting the search of Stephen Edwards' or Edwin Edwards' homes, that argument has been waived for lack of sufficient development in the brief. *See United States v. Posada-Rios*, 158 F.3d 832, 867 (5th Cir. 1998) (deeming issued waived as a result of inadequate briefing).

IV.

At trial the district court admitted, over hearsay objection, testimony from Bernie Klein ("Klein"), describing statements made to him by Sam Gilliam ("Gilliam"). It concluded that the statements were non-hearsay because they were statements by a co-conspirator in furtherance of a conspiracy. *See* Fed. R. Evid. 801(d)(2)(E). Klein backed the Gretna Belle riverboat casino project. At the time, Gilliam was a co-chairman of the Louisiana Riverboat Gaming Commission. Klein testified that he approached Gilliam after Gilliam voted against the Gretna Belle. Klein was surprised because he believed that Gilliam supported the Gretna Belle. Klein further testified that when he confronted Gilliam about the vote, Gilliam admitted that he had been instructed to change his vote or lose his livelihood.

The district court also admitted, over hearsay objection, testimony from Judge Hillary Crain ("Crain"), describing statements made by Ralph Perlman ("Perlman"), again concluding that the statements were non-hearsay because they were statements by a co-conspirator in furtherance of a conspiracy. *See* Fed. R. Evid. 801(d)(2)(E). At the time, Crain was the chairman of the Gaming Control Board and Perlman was a Board member. Crain was responsible for ensuring compliance with the Board's rules, specifically its no-contact policy, whereby Board members agreed not to meet with anyone *ex parte* to discuss the licensing votes. Crain testified that Perlman said that he met Edwin Edwards for lunch, at which Edwin Edwards expressed interest in the upcoming vote. Crain also testified to a second, later statement by Perlman that he met with Edwin Edwards an additional time. Perlman reported that at that meeting Edwin Edwards asked him for his vote and told him that he already had the votes of the other Board members.

The defendants argue that the two aforementioned sets of statements were admitted in violation of the Confrontation Clause because the government failed to offer evidence that Gilliam or Perlman were conspirators or that their statements furthered the conspiracy. *See Bourjaily v. United States*, 483 U.S. 171, 182-183 (1987) (explaining that because the co-conspirator statement exception to the hearsay rule is "firmly rooted," proper admission of a co-conspirator statement does not offend the Sixth Amendment).

Although it is not clear from the record that the appellants asserted the Confrontation Clause as to all of these statements (as opposed to a hearsay objection), we need not address whether they were admitted in violation because we conclude that their admission was harmless beyond a reasonable doubt. *See Hafdahl v. Johnson*, 251 F.3d 528, 539-40 (5th Cir. 2001). To determine whether the error was harmless, "we consider the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's case." *Id.* (citation omitted).

All that these two sets of statements tend to prove is that the conspirators were influencing, or attempting to influence, the licensing votes.[9] There was a great deal of

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[9] The Gilliam statement goes a little farther, i.e., he indicates that someone threatened him. Though arguably prejudicial (much less so because the source of the threat was not identified), the threatening aspect of the persuasion is minimally harmful because it does not tend to prove any element of any charged offense. In fact, the defendants concede that "the evidence having to do with the corruption of the commission and the licensing process does not comprise one of the seven schemes that are the predicates for the substantive portions of RICO[.]"

evidence of this fact in the record, including a number of Fed. R. Evid. 801(d)(2) admissions by the defendants. Furthermore, the defendants extensively cross-examined both witnesses: in each case the cross-examination took up much of an entire court day, Klein's cross-examination testimony taking up 140 pages of transcript and Crane's 167 pages. Finally and most importantly, having reviewed the record, we conclude that government presented a strong case of guilt, including the aforementioned admissions, each victim's testimony to the defendants' extortion efforts and overwhelming documentary and wiretap evidence.

V.

Nearly three months into the trial, the district court was faced with a major disruption when one of the defendants, Bobby Johnson, underwent multiple bypass surgery. Although the March 2000 operation was considered urgent, Johnson's heart condition was not a recent development. The problem first surfaced in relation to the trial when one of Johnson's attorneys, Patrick Fanning ("Fanning"), sent the district court a letter informing it of Johnson's health problems. The September 10, 1999 letter explained that Johnson had learned the previous day that he had six blocked arteries, a condition that was not treatable by any method other than surgery. It further stated that during the next week, Johnson would be speaking to several surgeons to schedule the procedure as soon as possible. At a status conference on September 13-14, the district court expressed its concern about Johnson's health, and suggested that any surgery should be scheduled well in advance of the January 10, 2000 trial setting. It specifically admonished him not to wait until the last minute.

Indeed, only one day after the hearing, Johnson's cardiovascular surgeon, Carlton H. Sheely, M.D. ("Dr.

Sheely"), sent Johnson a letter confirming that bypass surgery had been scheduled for September 24. Just two days prior to surgery, however, Johnson cancelled it and decided instead to undergo chelation therapy, an alternative treatment. A major factor in this decision was Johnson's fear that he would not survive the operation. His father-in-law had died after bypass surgery, and Johnson was afraid that he would suffer the same fate. Beyond assuaging his fears, though, chelation therapy had little to recommend it. Even Johnson admits that the evidence in support of it was mixed at best, and one of his doctors criticized it as "quackery."

Despite the district court's expressed concern about his condition, its worry that his health might jeopardize the trial schedule, and its desire to be kept up-to-date regarding the situation, Johnson never informed it that surgery had been scheduled and canceled. Moreover, instead of the careful medical attention that his condition required, Johnson went from September 1999 until March 2000 without seeing a cardiologist. During this time, he was treated by Stephanie F. Cave, M.D. ("Dr. Cave"), his physician and family friend, and James P. Carter, M.D., Chairman of the Nutrition Department at the Tulane School of Public Health and Tropical Medicine and a proponent of chelation therapy. Over the course of his chelation treatment, Johnson did report feeling better. According to Dr. Sheely, however, this perceived improvement is consistent with the placebo effect. Therefore, by the start of trial on January 10, 2000, Johnson had cancelled the surgery that two separate cardiologists had recommended, had avoided his regular cardiologist, and had embarked on an unproven treatment regime. The only indication of this turn of events that he gave to the district court was a brief reference during a December 10, 1999 pretrial conference to the fact that he was currently undergoing chelation therapy.

Set against this course of conduct was Johnson's firm belief that it was in his best interest to go to trial with the rest of the defendants, particularly Edwin Edwards. Specifically, he was hoping that some of the former governor's reputed good will would rub off on him. Moreover, his attorney's strategy was, in part, to portray Johnson as a victim of the crossfire in a decades-long battle between Edwin Edwards and the federal government. Johnson worried that the surgery would jeopardize his ability to be tried with the entire group of defendants, and he was, in the words of his attorney, "hell-bent" on going to verdict with them.

As the trial progressed, Johnson initially reported no complaints about his health. On March 2, nearly two months into the trial, the government began presenting evidence related to the Jazz Scheme and Johnson's role in it. This evidence was particularly damaging to Johnson's defense. He was heard on tape threatening Jazz vice-president Mark Bradley ("Bradley"), who also took the stand against Johnson. Several newspaper articles noted the devastating effect of the tapes and Bradley's testimony, speculating that it was difficult to imagine how Johnson would be able to beat the charges. By March 13, the government had completed its presentation on the Jazz Scheme and moved on to the 15th Riverboat Scheme, a matter that did not relate to Johnson. The completion of the government's case against Johnson marked the beginning of his continued absence from the trial. On March 14, Johnson left the proceedings early. When he had to leave early again the next day, attorney Fanning informed the district court that his client was having recurring trouble with his health. As he had done for all his absences since September 1999, Johnson waived his right to be present. Fanning further indicated that he had no intention of requesting a continuance or severance, as Johnson still wanted to continue with the trial.

Despite the increasing likelihood that his health would be a major obstacle to his ability to continue with the trial, thereby presenting serious trial management problems for the district court, Johnson refused to see a cardiologist. On March 16, Fanning asked for the district court's help in convincing his client to visit the cardiologist. The district court flirted with the possibility of forcing Johnson to undergo a medical evaluation as a condition of his bail, but ultimately decided against it. On March 17 and 21, Johnson yet again left the trial before the afternoon session, waiving his presence on both occasions. He never returned. At a March 21 conference, the first of several regarding Johnson's predicament, the district court learned that Johnson had not seen a cardiologist since September 1999. Nevertheless, Johnson insisted that he did not want a severance or mistrial because he still believed that it was in his best strategic interest to proceed with the trial.

The next day, the district court was informed that Johnson had finally visited a cardiologist, Joseph Deumite, M.D. ("Dr. Deumite"), who had recommended an urgent heart catheterization. The district court was also advised that, unlike every time in the past, Johnson was now refusing to waive his presence even though the government's case against him was finished. On March 23, the district court received a letter from Dr. Deumite stating that bypass surgery had been scheduled for March 28. After the operation was performed, the government moved for trial in absentia. Johnson, whose team was split on strategic issues, sought a continuance.

On April 3, the district court held a conference to consider whether, and to what extent, Johnson could return from surgery to take part in his trial. After hearing from Dr. Sheely and Dr. Deumite, it concluded that the best available alternative was to grant Johnson's pending motion for a

continuance. Johnson could use this time to recuperate, possibly enough to participate in the trial with certain accommodations. These accommodations, which included audio, video, or computer communication, would allow Johnson to monitor the trial from the comfort of his home. The government agreed to this plan, but the other defendants, worried about the delay and seeking a severance from Johnson, objected. At that point, Fanning withdrew the motion for continuance, moved for a mistrial, and rejected the district court's proposed accommodations as unacceptable. In essence, as the district court noted, Johnson's deliberately reckless course of conduct with regard to his health had created a major problem: the government was moving for trial in absentia, one defendant had withdrawn a motion for continuance and moved instead for mistrial, and the other defendants were seeking a severance. The district court's tentative solution was to allow testimony to continue on matters unrelated to Johnson, giving Johnson the right to recall any of the witnesses on cross examination.

The following day, the district court sua sponte reconsidered this ruling and postponed trial until April 10. Concerned that Johnson did not really support the motion that Fanning had filed, the district court ordered him to submit an affidavit confirming his consent to a mistrial. During chambers conferences on April 4 and 6, it was clear from the statements of Fanning, Fanning's co-counsel, Ernest Johnson, and Bobby Johnson's wife, Kim Johnson ("Mrs. Johnson"), that Johnson did not consent to a mistrial and instead wanted to go forward with the trial. Further complicating the situation, Fanning and Ernest Johnson suggested to the district court that Johnson might not be competent as a result of his medication and post-operation depression. Competency aside, it was clear that the relationship and communication between Fanning and Johnson had badly deteriorated. Specifically, Johnson was

angry at Fanning after reading press coverage of Fanning's reference to his client in open court as a "buffoon." Ultimately, the district court, without an affidavit from Johnson and unsure as to whether any such affidavit would be knowing and intelligent, denied the motion for mistrial and granted the government's motion for trial in absentia.

Before the trial resumed on the morning of April 10, Fanning filed another motion for mistrial, which was now accompanied by affidavit from Johnson. The district court denied this motion, but stressed that Johnson could still take advantage of the numerous accommodations it had previously offered him. These options included (1) providing Johnson with a more comfortable chair, (2) having a nurse present at all times to monitor Johnson's blood pressure and check on his overall health, (3) instituting longer and more frequent breaks in the trial, (4) allowing Johnson to participate through audio or video feeds, (5) providing Johnson and his counsel with real time transcription of trial proceedings, (6) permitting counsel to take as many recesses as necessary to confer with Johnson, (7) allowing communication equipment such as cell phones or beepers in the courtroom so that counsel could reach Johnson, (8) appointing an additional attorney to stay at home with Johnson to advise him from that location, (9) exercising discretion under Fed. R. Evid. 611 to allow Johnson to present his defense after the other defendants had completed their case, and (10) permitting Johnson to testify as the last witness in the trial. All of these options would be provided at the expense of the district court. Nevertheless, Johnson declined them.

Johnson did not return to court until after the jury delivered its verdict. Although offered a chance to testify in his defense, taking frequent or extended breaks as his health required, he claimed that he was physically unable to do so.

In all, the defendants were able to put on their case in a mere four days, as Edwin Edwards was the sole defendant to testify. Johnson also failed to offer any evidence in his defense. On April 17, the government presented its rebuttal case, which took less than one day. Before the government was allowed to make its closing argument in the Jazz Scheme, the district court contacted Dr. Deumite to obtain a progress report on Johnson's recovery. Even though Dr. Deumite had not seen Johnson in ten days, he told the district court that he expected him to have improved substantially. He also noted that most patients would feel ready to return to at least limited activity about three weeks after the operation, and that Johnson's recovery period was reaching that point. The government was then allowed to finish its closing arguments. The defendants, including Johnson, also made their closing arguments before the case was submitted to the jury. Following the jury's verdict finding him guilty on several counts, Johnson filed a motion for a new trial, arguing that the district court's decision to try him in absentia was erroneous. The district court held extensive hearings on the issue and ultimately denied the motion in an exhaustive opinion.

Johnson's absence from the final weeks of his trial implicates constitutional, statutory, and commonlaw rights. Rule 43 of the Federal Rules of Criminal Procedure codifies these rights, including due process, the Confrontation Clause, and the common law right to be present. *United States v. Navarro*, 169 F.3d 228, 236 (5th Cir. 1999). Under Rule 43, the defendant's presence is not necessary if he becomes "voluntarily absent" after the commencement of the trial. *Id.* We review the district court's determination that Johnson's absence was voluntary for clear error. *United States v. Davis*, 61 F.3d 291, 302 (5th Cir. 1995). If we conclude that he voluntarily waived his right to be present at his own trial, we then consider whether the district court abused its

discretion in deciding that there was a controlling public interest in continuing with the trial in his absence. *See id.*

The district court concluded that Johnson's absence was voluntary based on its finding that he made a deliberate tactical decision to postpone the surgery in order to gain the perceived strategic advantage of going to verdict with Edwin Edwards. It clearly viewed Johnson's failure to keep it informed of his medical decisions as consistent with the strategy to avoid severance at all costs. In light of the fact that the surgery he had in March 2000 was virtually the same operation that had been scheduled in September 1999, the district court was also suspicious of the timing of Johnson's decision, coming immediately after the government presented damaging evidence against him. Finally, it thought that his post-surgery legal maneuvers, including the shifting positions and his rejection of the district court's accommodations, were indicative of an unwillingness rather than an inability to continue with the trial.

Given the record evidence and the highly deferential standard under which we review the district court's determination, we cannot conclude that its finding of voluntary absence is clearly erroneous. In doing so, however, we note that Johnson's case presents a unique situation, not perfectly analogous to the caselaw relied on by either party. On one hand, several courts have considered scenarios wherein the defendant voluntarily absents himself from the trial by either exaggerating his symptoms or by exploiting a nonemergency condition in an obvious attempt to avoid trial. For example, in *United States v. Pastor*, 557 F.2d 930 (2d Cir. 1977), the Second Circuit based its conclusion that the defendant was voluntarily absent on its disbelief that he was experiencing the severe heart problems he claimed. *See id.* at 937 (concluding that defendant was "exaggerating his illness" in an effort to postpone the

proceedings in his case). Similarly, in *United States v. Barton*, 647 F.2d 224 (2d Cir. 1981), the Second Circuit noted the disingenuous nature of the defendant's decision to undergo spinal surgery on the eve of trial despite the fact that his doctor had recommended the surgery seventeen months earlier. *See id.* at 238. The doctor stated that the operation was not performed on an emergency basis and that the defendant's request for surgery came "out of the blue." *Id.* Both of these cases are consistent with the law of our circuit, which holds that a defendant cannot avoid trial by misrepresenting or exploiting his medical condition. *See Davis*, 61 F.3d at 302-03 (holding that the defendant's absence was voluntary where her complaints of symptoms were not supported by medical records).

In another line of decisions, however, Rule 43 has been held to prevent the trial court from continuing with proceedings when a legitimate medical emergency renders the defendant unable to be present. Johnson relies heavily on *United States v. Novaton*, 271 F.3d 968, 994-95 (11th Cir. 2001), in which the trial court continued with the proceedings after one of the defendants fell ill. The Eleventh Circuit vacated the conviction and remanded for a new trial, finding clear error in the district court's determination that the defendant's absence was voluntary. *Id.* at 997. In so holding, the Eleventh Circuit noted that after the defendant became ill, he and his counsel "cooperated commendably with the government and the district court" before eventually moving for a mistrial. *Id.* Accordingly, under the *Novaton* standard, which we find entirely reasonable, a sudden, incapacitating illness can render a defendant involuntarily absent, especially when he cooperates with the trial court to minimize the disruptive effect of his condition.

Johnson's case does not fit neatly into either one of these lines of decisions. Unlike the defendants' symptoms in

Barton and *Pastor*, Johnson's symptoms were not a bluff, nor did his decision to have surgery come "out of the blue." Johnson's doctors testified that although his symptoms were the same in March as in September, they had become more acute and his coronary disease had progressed. The doctors also acknowledged the effect that a stressful trial would have on Johnson's heart condition. Even after the surgery, there was no indication that he was faking his symptoms, as his doctor testified that they did not believe that he was malingering during the recovery period. The central distinction between Johnson's situation and the *Barton-Pastor* line, therefore, is that Johnson did not exploit his health condition to avoid a trial.

Nevertheless, this distinction does not make the district court's finding of voluntary absence clearly erroneous. There is ample support in the record for the district court's conclusion that Johnson's reckless course of conduct was part of a deliberate, tactical effort to avoid severance. Pursuant to this strategy, he avoided surgery in September 1999 even though two cardiologists had recommended it. He never told the district court that the surgery had been scheduled or canceled, thereby leaving it in the dark about the seriousness of his condition. During the months preceding the trial, he failed to see a cardiologist, apparently out of fear that he would be advised yet again that surgery was necessary. This refusal to seek proper treatment and failure to keep the district court informed of his condition deprived it of the ability to take actions to prevent Johnson's condition from jeopardizing its management of a long, complex, multi-defendant trial. As a result of the lack of cooperation from Johnson, the district court was unaware that a severance might be necessary. At the very least, the district court was unable to take Johnson's condition into account when it was determining how best to schedule the presentation of evidence over the course of the trial.

Further supporting the district court's conclusion that Johnson's absence was the result of an informed trial strategy was his post-operation legal maneuvering. Following his decision to finally undergo surgery after the government had completed a very strong case against him, he repeatedly refused to cooperate with the district court to minimize the disruption that his operation had caused. After initially seeking a continuance, he then pursued what could arguably be described as a boycott strategy. He moved unsuccessfully for a mistrial and then refused every accommodation that the district court offered him. Moreover, despite the fact that the government's case against him had already been completed, he would not waive his presence even though he had done so on every other occasion. This lack of cooperation distinguishes the present case from *Novaton*, in which the defendant "cooperated commendably" with the trial court. *Novaton*, 271 F.3d at 997.

In essence, by the time Johnson finally left the trial for good, his absence was purely the result of his own decision to avoid necessary medical treatment and his failure to keep the district court apprised of his condition. Furthermore, there is considerable evidence that these actions were part of a strategy to go to verdict with Edwin Edwards. Although Johnson has the right under Rule 43 to be present at his trial, he is not entitled to unilaterally dictate its time and circumstances. *See Davis*, 61 F.3d at 302 (quoting *United States v. Tortora*, 464 F.2d 1202, 1208 (2d Cir. 1972)). Otherwise, a defendant with a serious health condition like Johnson's would have the ability to get two bites at the apple by refusing necessary medical treatment before trial, waiting to gauge the strength of the government's presentation, and ultimately obtaining a mistrial if he then decided to have the treatment. As we decline to interpret Rule 43 as a tool for such tactical maneuvering, we hold that the district court's determination

that Johnson's absence was voluntary is not clearly erroneous.

Furthermore, we have little difficulty concluding that the district court did not abuse its discretion in continuing with the proceedings in Johnson's absence. The district court painstakingly chronicled the great expense and time invested in this long, complex, multi-defendant trial up to the point of Johnson's departure. The trial was entering its third month, and the burdens which would have been placed on the witnesses, jurors, defendants, and the district court far exceeded the public interest in postponing the proceedings or conducting a separate trial with Johnson present. *See id.* at 303 (finding no abuse of discretion in continuing with complex, multi-defendant trial despite voluntarily absent defendant). Accordingly, perceiving no clear error in the district court's finding that Johnson was voluntarily absent, and discerning no abuse of discretion in its decision allowing the trial to proceed in his absence, we hold that there was no violation of Rule 43.

VI.

Eleven days after the jury began its deliberations in this case, the court dismissed Juror 68. The events leading up to that dismissal are as follows:

Juror 68 first came to the district court's attention about midway through trial when it received an anonymous phone call (the "Bias Call") accusing Juror 68 of (1) talking about the case at church functions; (2) being involved with Edwin Edwards in a medical transportation business; (3) seeking counseling from his pastor about the verdict; and (4) having a bias against Edwin Edwards. The court questioned Juror 68 about the allegations and made an initial determination that they were baseless. After the United States Marshals were able to identify the anonymous callers,

the district court made a testimonial record of the allegations and again concluded that the allegations were baseless. In dismissing Juror 68, the court explained that the Bias Call had nothing to do with his decision.

Other events occurring during trial were slightly more troubling. First, the court observed that Juror 68 had, contrary to the court's instructions, held onto a piece of transcript that was distributed during trial (the "Transcript Incident"). Second, the court noticed that Juror 68 had, contrary to the court's instructions, written his juror number on an evidence binder that was later re-used and handed to Edwin Edwards during his testimony (the "Binder Incident"). Despite these failures to follow the court's instructions, the court took no action, allowing deliberations to begin on April 24th.

On April 25th, a U.S. Marshal reported that he observed a dictionary and thesaurus in the jury room ("Dictionary Incident"). The court removed the books and re-instructed the jury not to bring any outside materials into the jury room. The court subsequently determined that it was Juror 68 who was responsible for bringing the books in and that the definitions of key terms, i.e., "conspiracy," "extortion" and "extort" were discussed. Again, the district court exercised restraint, declining to take further action.[10]

On April 27th, the district court was informed that Juror 68 had left the jury room in tears. Per the court's instructions, Juror 68 wrote a note ("Jury Note 7"), asserting that he has "doubts" and that he is being "intimidated" by other jurors, and suggesting that perhaps he should be

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[10] The district court noted that Juror 68 kept the dictionary at his work station despite the fact that another juror had told him that he was not supposed to use it.

dismissed. Again demonstrating restraint, the court denied the government's motion to dismiss Juror 68 without interviewing any of the jurors, and re-instructed the jury regarding their duty to deliberate.

On May 1st, the court received a note signed by the Foreman ("Jury Note 11"), alleging that an unidentified juror was refusing to participate in deliberations. The court questioned the Foreman about Jury Note 11,[11] determining that the note was referring to Juror 68. When questioned about the note, the Foreman mentioned, in trying to explain the note's allegation that Juror 68 was biased, that other jurors had seen Juror 68 on one occasion bring a note into the jury room and on another occasion remove sheets from his notebook from the jury room. In addition, there was subsequent testimony that Juror 68 was referring to the note during deliberations. Understandably, the district court expressed great concern at the possibility that Juror 68 was again bringing extrinsic material into the jury room.

Accordingly, on May 2nd the court held a hearing to question Juror 68 about Jury Note 11. Without informing Juror 68 about the Foreman's testimony, the court also asked Juror 68 whether he brought any notes in or out of the jury room. Juror 68 responded in the negative. The district court then interviewed the rest of the jurors about the two note incidents described by the Foreman; all but one of the jurors testified, in contradiction to Juror 68's testimony, to being aware of one or both of the incidents.

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[11] The note provided: "We feel a certain juror is biased and refuses to participate in deliberations. He has his mind made up, but will not discuss his reasoning. After many, many attempts by ALL jurors he still refuses. And he recently has gone as far as to tell a fellow juror to not speak to him at all. We do not know how to proceed with this juror's refusal to participate in deliberations."

On May 3rd, over the prosecution's objection, the district court allowed Juror 68 an opportunity to explain the inconsistencies between his testimony and that of the fellow jurors. Juror 68 then partially recanted his previous testimony, admitting to bringing a note into the jury room and removing sheets from his notebook. In fact, he informed the court that, contrary to the court's instructions, he still had the note in his wallet. He explained that he remembered the two incidents after the court adjourned for the evening recess. But his recollection of the two incidents still differed materially from that of other jurors.

Following this testimony, the district court heard argument on the government's motion to dismiss Juror 68. As noted above, on May 5th the court dismissed Juror 68, issuing detailed findings of fact and conclusions of law. The district court based its dismissal of Juror 68 on its findings that Juror 68 had displayed an inability to follow the court's instructions and that, in his dealings with the court, Juror 68 was lacking in candor. With respect to the former finding, the district court cited the Binder Incident, the Transcript Incident, the April 25th dictionary incident and Juror 68's import and export of material from the jury room. With respect to the latter finding, the district court relied on his further finding that Juror 68 testified dishonestly on May 2nd when he denied importing and exporting material into the jury room. Finally, the district court made clear that it was not basing the dismissal on Juror 68's view of the evidence.

A.

District courts have discretion to dismiss jurors for just cause. *United States v. Fryar*, 867 F.2d 850, 853 (5th Cir. 1989). A district court abuses its discretion only "when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Whitehead v.*

Food Max of Miss., Inc., 277 F.3d 791, 792 (5th Cir. 2002); *see also United States v. Virgen-Moreno*, 265 F.3d 276, 288 (5th Cir. 2001) ("Unless the court's removal of the juror has prejudiced the defendant, we will not disturb the court's decision. Moreover, we will find prejudice only if the juror was discharged without factual support or for a legally irrelevant reason.") (citation omitted). Finally, "[u]nder the clearly erroneous standard, we may not reverse the district court's findings of fact unless the review of the relevant evidence leaves us with the definite and firm conviction that a mistake has been committed." *Broussard v. United States*, 989 F.2d 171, 178 (5th Cir. 1993).

The court found, based upon live testimony, that Juror 68 was unable to follow instructions and that he had displayed a lack of candor. The defendants do not contend that these two reasons for dismissal are legally irrelevant, *see Fryar*, 867 F.2d at 853 (affirming dismissal based on lack of candor); *United States v. Vega*, 72 F.3d 507, 512 (7th Cir. 1995) (affirming dismissal based on failure to follow instructions). Instead, they appear to contend that the "lack of candor" and "inability to follow instructions"" findings are clearly erroneous. We disagree.

With respect to his lack of candor, in its May 5, 2000 statement of reasons for dismissing Juror 68, the district court noted that it asked Juror 68 on May 2, 2000 to disclose any material of any type whatsoever that he brought into or took out of the jury room and to describe each item with particularity. When answering these questions on May 2nd, Juror 68 did not disclose the two incidents described by the Foreman and the other jurors on May 1st and 2nd. He did disclose the incidents on May 3rd when he was recalled, but the district court observed that his testimony seemed coached, noting that "some of his statements yesterday came out of a case." In fact, the court described Juror 68's May

3rd testimony as "shock[ing]." Furthermore, as noted above, Juror 68's May 3rd description of the various incidents was still inconsistent with that of other jurors'.[12] These inconsistencies also clearly support the "lack of candor" finding. Finally, the district court was rightly concerned with the fact that Juror 68 failed to correct his earlier misstatements until recalled and questioned by the court. Accordingly, we cannot say that the district court's finding of fact is clearly erroneous.

With respect to Juror 68's inability or unwillingness to follow instructions, the defendants apparently concede that his behavior with respect to the Dictionary Incident, Transcript Incident, Binder Incident and note incidents constituted a failure to follow instructions. The defendants argue, however, that these mistakes were innocent, understandable and harmless. In light of the standard of review, their concession is fatal, regardless of their personal view of the seriousness of Juror 68's infractions.[13] Collectively, these failures to follow the court instructions, in addition to any observations the court may have made respecting Juror 68's demeanor, clearly support the district court's factual finding that Juror 68 was unable to follow its instructions.

Alternatively, the defendants vigorously contend that the abuse of discretion standard should not apply to

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[12] For example, Juror 68 testified that he brought back all papers that he took out of the jury room. Other jurors testified that he brought back fewer pages. After observing the testimony, the district court expressly found the other jurors' version more credible.

[13] Perhaps the strongest evidence of Juror 68's inability to follow instructions is the fact that, even after all of the questions about taking notes in and out of the jury room, Juror 68 continued to keep a note in his wallet.

dismissals occurring after commencement of deliberation. They argue that we should adopt a much more stringent standard in such cases, reversing whenever there is "a possibility that the dismissal was prompted by the juror's doubts about the defendant's guilt." In support of this proposition, the defendants rely primarily on *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987), *United v. Thomas*, 116 F.3d 606 (2d Cir. 1997) and *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1990). Their reliance on these cases is misplaced; the holdings are not nearly so broad.

Brown and *Thomas*[14] are "jury nullification"[15] dismissals. In both, the district court dismissed a juror during deliberations, concluding that juror was refusing to apply the substantive law. *Brown*, 823 F.2d at 595; *Thomas*, 116 F.3d at 611-12. After reviewing the records, the D.C. Circuit and Second Circuit, respectively, reversed, concluding that the evidence revealed a "substantial possibility" that the juror was motivated not by a desire to nullify, but by legitimate concerns about the sufficiency of the evidence. *Brown*, 823 F.2d at 596; *Thomas*, 116 F.3d at 623. These courts reasoned that the "substantial possibility" rule was necessary for nullification-based dismissals because, due to the sanctity of jury deliberations, the court will

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[14] *Thomas* relies substantially on *Brown*. *See Thomas*, 115 F.3d at 622 ("We adopt the *Brown* rule as an appropriate limitation on a juror's dismissal in any case where the juror allegedly refuses to follow the law--whether the juror himself requests to be discharged from duty or, as in the instant case, fellow jurors raise allegations of this form of misconduct.").

[15] Black's Law Dictionary defines jury nullification as "a jur[or's] knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jur[or's] sense of justice, morality, or fairness." Black's Law Dictionary 862 (7th ed. 1999).

generally be unable to determine the true nature of the juror's difficulty. *Brown*, 823 F.3d at 596; *Thomas*, 116 F.3d at 622 ("Given the necessary limitations on a court's investigatory authority in cases involving a juror's alleged refusal to follow the law, a lower evidentiary standard could lead to the removal of jurors on the basis of their view of the sufficiency of the prosecution's evidence.").

In *Symington*, the Ninth Circuit, relying on *Brown* and *Thomas*, reversed a district court's juror dismissal that rested on the juror's refusal to deliberate, concluding that a reasonable possibility existed that the other jurors' problems with the dismissed juror were based upon that juror's view on the sufficiency of the evidence. *Id.* at 1088. As the government notes in its brief, however, the court in *Symington* also specifically emphasized the narrow nature of its holding:

> Cases subject to [reasonable probability] rule, we emphasize, are infrequent. In general, questions of juror bias or competence focus on some event...that is both easily identifiable and subject to investigation and findings without intrusion into the deliberative process. In those cases, the presiding judge can make appropriate findings and establish whether a juror is biased or otherwise unable to serve without delving into the reasons underlying the juror's views on the merits of the case. Since the district court's investigative authority is not constrained by the same jury secrecy concerns in those cases, the rule we announce here is not triggered. In cases where the allegations go to the quality and coherence of the juror's views on the merits, however, a trial judge may not be able to

> assess the juror's competence without exposing the content of the juror's views. The rule we announce today applies only to those cases.

Symington, 195 F.3d at 1087 n.6.

As the discussion of the cases above illustrates, *Brown*, *Thomas* and *Symington* stand for the limited proposition that a court may not dismiss a juror based upon its conclusion that the juror is failing to participate in the deliberative process in accordance with law unless there is no possibility that the juror's problem stems from his view of the sufficiency of the evidence. Even at its broadest, the reasoning of these cases extends only to those dismissals where the juror's conduct cannot be evaluated without delving into the reasons underlying the jurors' views of the case, i.e., where the deliberative process has been implicated. As the dismissal in this case clearly did not require evaluation of such evidence, and in fact the district court took great pains to protect jury secrecy, the *Brown*, *Thomas* and *Symington* rule is inapplicable.

Alternatively, the defendants may contend that the focus should be on the motivation of the judge or party in initiating dismissal proceedings, i.e., dismissal is inappropriate whenever the court or a party initiates a motion to dismiss a juror based upon that juror's evaluation of the evidence. With respect to the latter, we do not suggest that the incentives of the parties seeking dismissal have no relevance, but we reject any suggestion that they are in any manner controlling. We assume that most litigants, while respecting their duty to the court, actively seek dismissal only of those jurors that they believe are adverse to their client's case. The motivation rule would functionally invalidate every party-initiated dismissal. As to the former,

having carefully reviewed the entire record, we find no evidence that the district court dismissed Juror 68 for any reason other than those given.

B.

The defendants also assert that the district court's investigation of Juror 68's improper conduct was too broad in scope. Specifically, they appear to contend that once the district court had any inkling that the jurors were having trouble with Juror 68 because of his view of the evidence, any inquiry into his misconduct should have stopped. The defendants have cited no authority or provided any rationale for this proposition; as no rationale for it is apparent, we decline to adopt it.[16] While we recognize the district court's duty to protect the secrecy of jury deliberations, the district court continues to enjoy wide discretion to determine the proper scope of an investigation into whether just cause to dismiss a juror exists as long as the content of the deliberations is left undisturbed. *See Fryar*, 867 F.2d at 854; *cf. Thomas*, 116 F.3d at 623 ("Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two evils--protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity.").

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16 The defendants do not explain or provide any authority for the proposition that a party's intent in seeking a dismissal should be controlling. They again cite to *Brown* and *Thomas*, but they do not explain their relevance. *Brown* and *Thomas* do note, and we agree, that district courts must be careful not to jeopardize the secrecy of deliberations by delving into the thought processes of the jurors. *See Thomas*, 116 F.3d at 618; *Brown*, 823 F.3d at 596. But the district court was very careful; it insisted that the jurors refrain from describing the content and method of their deliberations.

We conclude that the district court's investigation was not so broad in scope as to constitute an abuse of discretion. The district court did not interview any jurors until it received, on May 1st, the ambiguous Note 11 signed by the Foreman. As this was the second note indicating problems and the first including allegations of juror bias, it would seem the court was acting well within its discretion in attempting to determine what the problems were. It was in the process of interviewing the Foreman about the bias allegations that the district court discovered that Juror 68 was again violating the court's instructions. Understandably, the defendants do not contend that the court lacked discretion to investigate this evidence of misconduct.

C.

Finally, we note that there is a great deal of discussion in the briefs about whether Juror 68 was or was not a "hold-out" juror. This discussion is inapposite. Even assuming that Juror 68 was a hold-out juror, we have previously made clear that hold-out jurors are not immune from dismissal based upon just cause, *see United States v. Huntress*, 956 F.2d 1309, 1312-13 (5th Cir. 1992) ("*Wilson* in no way stands for the proposition that any evidence that the juror was a holdout raises a red flag.") (citing *United States v. Wilson*, 894 F.2d 1245, 1250 (11th Cir. 1990)), and the district court expressly disavowed any possibility that Juror 68 was being dismissed because of his view of the evidence. The defendants' implied assertion to the contrary is at best rank speculation. Accordingly, and in light of the discussion above, neither the dismissal of Juror 68 nor the investigation that led up to it provides a basis for reversal.

VII.

Brown, Johnson, and Stephen Edwards contend that there was insufficient evidence to support their convictions.

At the district court, they moved for acquittal under Fed. R. Crim. P. 29, and we review the denial of that motion de novo. *United States v. Alarcon*, 261 F.3d 416, 421 (5th Cir. 2001). We must decide whether, viewing the evidence in the light most favorable to the government, a rational factfinder could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Williams*, 264 F.3d 561, 576 (5th Cir. 2001). We focus, therefore, on whether the verdict was reasonable, not whether we believe it is correct. *Id.*

A.

Brown challenges the sufficiency of the evidence supporting his extortion convictions, which also provided the basis for his RICO and RICO conspiracy convictions. Specifically, he argues that the evidence was insufficient on both of the government's extortion theories: extortion under color of official right and extortion by wrongful use of fear. Regarding the extortion under color of official right, Brown notes that in the usual case, this type of extortion is limited to the acts of public officials. *See United States v. Tomblin*, 46 F.3d 1369, 1382 (5th Cir. 1995). In cases where it has been applied to private persons, the conduct involved masquerading as a public official or aiding and abetting a public official's receipt of money. *See id.* Brown argues that there was no evidence that he either masqueraded as a public official or aided and abetted Governor Edwards' receipt of the money. Our review of the record, however, reveals ample evidence on which the jury could have reasonably based its verdict. Brown brought principals of LRGC/NORC to the Governor's Mansion to meet Edwin Edwards on several occasions. Moreover, Edwin Edwards assured them that "Cecil speaks for me," and "I will pass along any information through Cecil." These representations provided

sufficient evidence for the jury to conclude that Brown's threats were made under color of official right.

The jury also had sufficient evidence on the theory of extortion by wrongful use of fear.[17]

Extortion by wrongful use of fear includes fear of economic harm. *Id.* at 1384. This harm must take the form of a particular economic loss, not merely the loss of a potential benefit. *Id.* Brown argues that he did not exploit LRGC/NORC's fear of not receiving a license, as the evidence merely demonstrates that LRGC/NORC willingly paid him in the hope of receiving an extra benefit not available to others. He analogizes the situation to the facts of *United States v. Garcia*, 907 F.2d 380, 385 (2d Cir. 1990), in which the Second Circuit reasoned that a congressman who had taken money from a company could not be convicted of extortion absent any evidence that the company was making the payments out of fear. By paying the congressman, the Second Circuit held, the victim "was purchasing an advocate, not buying off a thug." *Id.* at 384. This was "not the stuff of which extortion is made." *Id.* at 385.

We disagree that this case is similar to *Garcia*. Instead, we find *United States v. Collins*, 78 F.3d 1021 (6th Cir. 1996), more instructive. In *Collins*, the Sixth Circuit refused to follow *Garcia* in light of evidence that the persons making the payments had indeed acted out of fear. *Id.* at 1030-31. Similarly, in the present case, the jury had ample evidence that the victims were acting out of fear of economic

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[17] Brown challenges the sufficiency of the evidence in support of the extortion charges relating to both the Jazz and LRGC/NORC schemes. His challenge to the extortion by wrongful use of fear relating to the Jazz scheme is identical to Johnson's argument and fails for the same reasons. *See infra*, Part VII.B.

loss. For example, it could have credited the testimony of several persons who stated that as a result of Brown's threats, they believed that they would not even have an opportunity to obtain a license. One such person, Allan Morse, testified that: "[W]e all felt the same way. Everybody at every meeting felt that if these payments were not made, then it would automatically shut off any chance that we would receive a license." In light of this evidence we conclude that this is not a situation like *Garcia*, in which the payees were merely attempting to obtain preferential access and thought that, even without the payments, they would have a fair opportunity to compete for the license. To the contrary, unlike *Garcia*, this is the stuff of which extortion is made.[18]

Brown also attacks his mail and wire fraud convictions by arguing that there was no fraud because when he promised a license to LRGC/NORC, he firmly believed that he could deliver. In particular, he cites the testimony of Russ Meyer, the president of LRGC, who said that "he was absolutely convinced that what he was saying was a hundred percent true. I believe that Cecil felt at that time he was able to deliver what he said he could." This argument, however, overlooks the substantial evidence of fraud in his dealings with LRGC/NORC. Such evidence of deceit includes: (1) in January 1993, Brown convinced LRGC/NORC that they would receive not one, but two licenses in order to extract another $150,000 from the principals, (2) just days before the Gaming Commission vote, Brown surreptitiously entered into a "consulting agreement" with a competing applicant,

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[18] Brown's attack on his Travel Act conviction also fails for these same reasons. The basis of the Travel Act conviction is that Brown engaged in interstate travel in order to carry out his extortion. He does not dispute that he traveled to Missouri, only whether his actions constituted extortion. As his extortion challenge is unpersuasive, his attack on the Travel Act conviction fails.

promising that applicant a license, and (3) prior to the awarding of certificates of preliminary approval, Brown informed the companies that they would not be receiving a license because Governor Edwards simply had "too many friends." Given this evidence, we conclude that the jury's verdict should stand.

B.

Like Brown, Johnson argues that the evidence supporting the government's theory of extortion by wrongful use of fear relating to the Jazz scheme was insufficient. He contends that, at most, Jazz principals were placed in fear of the loss of a potential economic benefit, which is insufficient to support an extortion conviction. *See Tomblin*, 46 F.3d at 1384 (stating that "fear of losing a potential benefit does not suffice"). As with Brown, this argument is unavailing. The jury had ample evidence that Johnson capitalized on Jazz's fear that by not making the payments, it would lose the right to compete at all, not merely preferential treatment in an otherwise fair competition. For example, the jury heard Johnson threaten Jazz that if it did not give him a 12.5% cut, "that was all there was to it. You gone with Edwin. . . . And you know it too and [expletive] you'll be walking the streets." He also stated, "I just hate to see you all lose the license. I mean it's gone and you can write that off you know." At one point, Johnson brought Brown to meet Bradley and introduced Brown as his "partner." He renewed his demand of 12.5%, and pointed to Brown, saying, "You wasn't gonna get none, you was gone, 'til I got in there and got him involved." Bradley testified that he interpreted Johnson's and Brown's statements as threats that Jazz would not receive a license if it did not pay. Based on this evidence, the jury's verdict regarding the Jazz scheme extortion was well supported. Similarly, Johnson's Travel

Act conviction, which he attacks on the same grounds, was supported by sufficient evidence of fear of economic loss.

Johnson also challenges the sufficiency of the evidence relating to his false statements conviction. To establish a false statements violation under 18 U.S.C. § 1001, the government must prove that a statement is false and material. *See United States v. Wright*, 211 F.3d 233, 238 (5th Cir. 2000). Although he does not dispute the jury's finding of falsity, Johnson argues that there was insufficient evidence of materiality. Succinctly stated, his argument is that materiality is lacking because the government never believed his lies. He contends that the FBI was already familiar with the tapes of Johnson's statements by the time FBI Agent Rossman, to whom the statements were made, became involved in the Jazz investigation. In light of these tapes, Johnson's claims about Bradley were immediately known to be false and never had the effect of actually deceiving Agent Rossman. It is not necessary, however, for the misrepresentations to "have influenced the actions of the Government agency, and the Government agents need not have been actually deceived." *United States v. Markham*, 537 F.2d 187, 196 (5th Cir. 1976). The statements must only "have the natural tendency or capacity to deceive, affect, or influence the federal agency." *United States v. Sidhu*, 130 F.3d 644, 650 (5th Cir. 1997) (holding that false exculpatory statements can support conviction under § 1001). Our review of the record reveals that the jury had sufficient evidence to reach its conclusion that Johnson's statements were material. Agent Rossman testified that Johnson lied about issues central to the investigation, covered up his involvement, and attacked the credibility of a cooperating witness. In light of this testimony, the evidence was sufficient to support the false statements conviction.

C.

Stephen Edwards challenges the sufficiency of the evidence supporting his conviction for extortion as well as aiding and abetting in relation to the 15th Riverboat license, which involved the extortion of DeBartolo. DeBartolo and his business partner, Ed Muransky ("Muransky"), had formed DeBartolo Entertainment Corp. and entered into a joint venture with Hollywood Casino to apply for the last license. DeBartolo testified at trial that on the evening of March 5, 1997, the day before his final presentation to the Gaming Control Board, he met with Edwin Edwards at the Radisson Hotel. Edwin Edwards gave him a piece of paper, on which he had written the figure of $400,000, and told him that without the payment there would be a serious problem with the license. DeBartolo paid the $400,000 on March 12, 1997, the day before the Board was to vote. The next morning, Edwin Edwards called to inform him that the Board had voted unanimously in favor of his application.

To be convicted of aiding and abetting, Stephen Edwards must have associated with the criminal venture, purposefully participated in it, and sought by his actions to make it succeed. *United States v. Vaden*, 912 F.2d 780, 783 (5th Cir. 1990). "An aider and abettor is liable for criminal acts that are the "'natural or probable consequence of the crime' that he counseled, commanded, or otherwise encouraged." *Id.* (quoting *United States v. Fagan*, 821 F.2d 1002, 1012 (5th Cir. 1987)). Stephen Edwards contends that there was no evidence that he committed any act or affirmative conduct that aided the extortion of DeBartolo. Relying on testimony by both DeBartolo and Muransky, he contends that the only proposal possibly rising to the level of extortion was the March 5, 1997 request, in which Stephen Edwards did not directly participate.

Despite Stephen Edwards' absence from the March 5, 1997 meeting, the evidence supports the government's contention that the meeting represented only the culmination of an ongoing scheme to extort DeBartolo. In September 1996, Stephen Edwards sent a "consulting agreement" to DeBartolo and Muransky that provided for payment to Stephen Edwards of a monthly $50,000 fee over a renewable five-year term. DeBartolo and Muransky refused to pay such an exorbitant fee and tore up the proposed agreement. After the March meeting, however, Edwin Edwards sent DeBartolo a retainer agreement under which Stephen Edwards would be paid $10,000 per month. The government characterized this as a sham arrangement to funnel payments to Edwin Edwards and Stephen Edwards. Indeed, DeBartolo's testimony supported this interpretation, as he stated that at the time he had no need for more lawyers or legal services. Stephen Edwards dismisses the effect of these two consulting agreements. Regarding the first proposed contract, he notes that DeBartolo rejected it without subsequent threats from Edwin Edwards or Stephen Edwards. There was no fear, therefore, of reprisals and consequently no extortion. As for the second agreement, Stephen Edwards points to the testimony of Muransky, who admitted that Stephen Edwards did provide some services and was probably entitled to some payment. These arguments are ultimately unpersuasive. We need not consider whether either one of the agreements, standing alone, might be insufficient to constitute extortion. Rather, the question we must answer is whether Stephen Edwards' involvement in these "sham" agreements entitled the jury to infer his knowledge of and participation in the entire scheme, which culminated in the $400,000 demand. In this respect, the evidence is sufficient. Both before the actual demand and immediately afterwards, DeBartolo was asked to sign agreements for services he did not need at a price that was unreasonable. The jury could have concluded that these agreements, which directly benefited Stephen Edwards, were

part of the scheme to extort DeBartolo. Moreover, there was evidence that Edwin Edwards and Stephen Edwards worked in close cooperation on the 15th Riverboat Scheme, such as a taped conversation during which Edwin Edwards told Stephen Edwards on March 10, 1997: "we've come to the point now where if this thing is gonna work we have to have an understanding . . . and I want to tell him that I want one percent of gross gaming revenue as defined by the statute." In light of this evidence and the deferential sufficiency standard, we conclude that the jury's verdict should stand.

VIII.

As noted above, the district court, relying on *Cleveland*, dismissed Counts 20-22 and 25-27 after the jury verdict as against Edwin Edwards and Stephen Edwards. Martin, Brown and Johnson were not charged with these Counts. Count 20 charged Edwin Edwards and Stephen Edwards with a mail and wire fraud conspiracy. Counts 21-22 and 25-26 charged Edwin Edwards and Stephen Edwards with wire fraud and Count 27 charged Edwin Edwards and Stephen Edwards with mail fraud. All of these counts related to the 15th Riverboat License Scheme. Again relying on *Cleveland*, the district court dismissed Count 6 as against Johnson. Edwin Edwards was acquitted on this charge; Martin, Brown and Stephen Edwards were not charged. Count 6 related to the Jazz Scheme.

Predicate act "5A" of Count 1, the RICO count, corresponds to Count 21. Predicate act "5B" corresponds to Count 22. Predicate act "5E" corresponds to Count 25. Predicate act "5F" corresponds to Count 26. Predicate act "5G" corresponds to Count 27. Predicate act "6" corresponds to Count 34.

The defendants contend that their convictions were tainted by evidence that would have been inadmissible "but

for" the counts premised upon the "license as property" theory rejected by *Cleveland*, i.e., there was a prejudicial spillover effect.

In the alternative, they argue that the dismissal of the mail and wire fraud counts [Counts 20-22 and 25-27] pursuant to *Cleveland* also requires dismissal of the money laundering count [Count 34], because the jury could have relied upon Counts 20-22 and 25-27 in concluding that the money used in the financial transaction underlying Count 34 involved the proceeds of unlawful activity. In addition, the defendants contend that the jury verdict on the RICO and RICO conspiracy counts [Counts 1 and 2] is tainted and must be reversed because the jury may have relied on predicate acts 5A-B, 5E-G and 6 in concluding that the defendants conducted the affairs of their RICO enterprise through a pattern of racketeering activity .

Finally, Martin contends that his own conviction on Counts 1 and 2 must be reversed because the jury only found him responsible for two predicate acts, one of which was Count 34 [predicate act 6].

A.

Both the government and the defendants fail to suggest a standard for reviewing the "spillover" claim or cite any Fifth Circuit "spillover" cases.[19] Generally, this Court

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[19] The defendants do cite two cases in support of their argument: *United States v. DiNome*, 954 F.2d 839 (2d Cir. 1992); *United States v. Tellier*, 83 F.3d 578, 582 (2d Cir. 1996) (citing *DiNome*). Neither cases, [sic] however, provides a standard of review for a "spillover" challenge and each is distinguishable from the present case. *See Tellier*, 83 F.3d at 581-582 (reversing a Hobbs act claim, citing prejudicial "spillover" where evidence on unproved RICO counts should not have been admitted); *DiNome*, 954 F.2d at 844-845 (noting that typically "spillover" is a term used in the severance context and concluding that the defendants' trial

uses the term "spillover" in discussing whether a district court abused its discretion in denying a motion for severance. *See, e.g., United States v. Peterson*, 244 F.3d 385, 393 (5th Cir. 2001) (noting that to be entitled to reversal in this context "the defendant must show that: (1) the joint trial prejudiced him to such an extent that the district court could not provide adequate protection; and (2) the prejudice outweighed the government's interest in economy of judicial administration."); *United States v. Pofahl*, 990 F.2d 1456, 1483 (5th Cir. 1993) (noting in this context that "the mere presence of a spillover effect does not ordinarily warrant severance"). This circuit has never addressed whether spillover from invalid claims can be a basis for granting a new trial. *Compare United States v. Vebeliunas*, 76 F.3d 1283, 1293 (2d Cir. 1996) (applying a three-factor test to this type of "retroactive misjoinder" challenge to determine whether the defendant was prejudiced and noting "[i]n cases where the vacated and remaining counts emanate from similar facts, and the evidence introduced would have been admissible as to both, it is difficult for a defendant to make a showing of prejudicial spillover."), *United States v. Murphy*, 836 F.2d 248, 255-56 (6th Cir. 1988) (finding no prejudice where remaining convictions were "conceptually a[nd] totally separate type of crime"), *United States v. Stefan*, 784 F.2d 1093, 1101 (11th Cir. 1986) (applying two-factor test) *with United States v. Holzer*, 840 F.2d 1343, 1349 (7th Cir. 1988) ("No rule of evidence is violated by the admission of evidence concerning a crime of which the defendant is acquitted, provided the crime was properly joined to the crime for which he was convicted and the crimes did not have to be severed for purposes of trial. It makes no difference, moreover, whether the jury acquits on some

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should have been severed after the court granted a Rule 29 motion on RICO claims where the RICO evidence would not have been otherwise inadmissible against them).

counts or the trial or reviewing court sets aside the conviction."). While we are willing to acknowledge that perhaps a grant of a new trial might be appropriate in some cases of "retroactive misjoinder," that case is not before us. At a minimum, drawing from our severance cases and authority from other circuits, the defendants must show that they experienced some prejudice as a result of the joinder of the invalid claims, i.e., that otherwise inadmissible evidence was admitted to prove the invalid fraud claims. They have not, and cannot do so. Any evidence admitted on these counts, presumably evidence that Edwin and Stephen Edwards were attempting to influence the 15th Riverboat License vote, was clearly relevant to the extortion counts; the fact that the defendants were manipulating the licensing process tends to prove that they promised those they extorted that they would do so.[20] Furthermore, it was admissible on the government's honest services theory. Finally, though unnecessary, this evidence was also admissible as against Martin because the 15th Riverboat License extortion scheme was part of the RICO conspiracy, of which Martin was charged and convicted. *Cf. Salinas v. United States*, 522 U.S. 52, 64 (1997) (holding that individual co-conspirator does not need to personally commit predicate acts to be convicted of a RICO conspiracy).

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[20] *Cf. United States v. Holzer*, 840 F.2d 1343, 1349 (7th Cir. 1988) ("No rule of evidence is violated by the admission of evidence concerning a crime of which the defendant is acquitted, provided the crime was properly joined to the crime for which he was convicted and the crimes did not have to be severed for purposes of trial. It makes no difference, moreover, whether the jury acquits on some counts or the trial or reviewing court sets aside the conviction.").

B.

At the close of evidence, the district court instructed the jury that it could convict the defendants on Count 34 if it found, in part, that he knowingly conducted a financial transaction involving the proceeds of extortion, mail fraud or wire fraud. In addition, the district court instructed the jury as to Counts 21-26 and 28-30 that it could convict Edwin Edwards, Stephen Edwards, Gregory Tarver and Ecotry Fuller of wire fraud on a "license as property" theory, i.e., if it found, in part, that they knowingly devised a scheme to deprive the State of Louisiana of property by obtaining the 15th Riverboat License by means of false or fraudulent pretenses. Accordingly, at least in theory, the jury was instructed that it could convict the defendants on Count 34 if it found that they knowingly conducted a financial transaction involving the proceeds of a "license as property" fraud. Therefore, in light of *Cleveland*, part of the Count 34 instruction was legally invalid.

However, the defendants do not identify a place in the record where they objected to the money laundering instruction, [21] and our independent review of the record has found no objection. Accordingly, we review the challenge only for "plain error." *See United States v. Jimenez*, 256 F.3d 330, 340 (5th Cir. 2001); Fed. R. Crim. P. 30; Fed. R. Crim. P. 52; *see e.g. Johnson v. United States*, 520 U.S. 461 (1997) (reviewing faulty instruction for plain error despite the fact that settled law at the time of trial supported the instruction).

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[21] The defendants cite to a pretrial motion to dismiss filed by Tarver. Even assuming *arguendo*, that this motion, filed September 15, 1999, could have properly raised an objection to the jury instructions given on April 24, 2000, the motion did not mention Count 34. This is not surprising in light of the fact that Tarver was not charged with money laundering.

"We follow a four step analysis for 'plain error' review: (1) there must be an 'error,' i.e., a 'deviation from a legal rule,' that has not been waived; (2) the error must be 'plain,' i.e., 'clear' or 'obvious' under current law; (3) the error must 'affect substantial rights,' i.e., it must have affected the outcome of the proceeding; and, (4) even if the error was 'plain' and 'affected substantial rights,' the Court of Appeals, exercising its discretion, should correct the error only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Burton*, 126 F.3d 666, 674 (5th Cir. 1997).

This circuit recognizes that a conviction must be reversed when disjunctive legal theories, one of which is legally insufficient, are submitted to the jury, the jury renders a general verdict of guilty and it is impossible to tell which ground the jury selected. *See Tomblin*, 46 F.3d at 1385; *cf. Yates v. United States*, 354 U.S. 298, 312 (1957) (originating the doctrine), *overruled on other grounds in Burks v. United States*, 437 U.S. 1 (1978).

However, *Yates* does not control every instance where a disjunctive instruction with a legally insufficient component is given. In *Griffin v. United States*, 502 U.S. 46 (1991), the Court held that a conviction should stand where a jury is instructed that it can convict on two theories, one of which is unsupported by the evidence. It reasoned:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law--whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally

> inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.

Griffin, 502 U.S. at 59.

In *United States v. Wilson*, 116 F.3d 1066, *reversed on other grounds United States v. Brown*, 161 F.3d 256, 257 n.1 (5th Cir. 1998) (en banc), we held that *Griffin*, not *Yates*, applies where a disjunctive instruction with a factually insufficient component is given, even if that component is also legally insufficient. *Wilson*, 116 F.3d at 1080; *see also Yates*, 354 U.S. at 312 ("In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, *and it is impossible to tell which ground the jury selected.*") (emphasis added). That is exactly what we have here. The defendants have never identified, despite the government's urging, any evidence in the record that would have supported a jury finding that they laundered the proceeds of a "license of property" fraud scheme,[22] and our independent review of the record has found none. Accordingly, we find no reversible error, plain or otherwise.

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[22] The defendants effectively conceded this point before the district court. In their reply to the government's assertion in its post-verdict memorandum on the effect of *Cleveland* that no such evidence existed, the defendants wrote only "If the government now takes the position that it was impossible for the jury to base its money laundering verdict on the mail and wire fraud related counts, then why did the Government present that theory to the grand jury in the indictment and why did the grand jury decide to accept that theory and charge the mail and wire fraud related counts as one of the sources of the laundered funds?".

C.

To restate, the defendants contend that reversal is required as a matter of law where the jury finds a pattern of racketeering based, in part, on predicate acts that have not been proven. This proposition has already been rejected by this circuit. *See United States v. Peacock*, 654 F.2d 339, 348, *vacated in part on other grounds*, 686 F.2d 356 (5th Cir. 1982); *see also Brennan v. United States*, 867 F.2d 111, 114-16 (2d Cir. 1989); *United States v. Cardall*, 885 F.2d 656, 682 (10th Cir. 1989); *United States v. Pepe*, 747 F.2d 632, 665-68 (11th Cir. 1984).

United States v. Marcello, 876 F.2d 1147 (5th Cir. 1989), cited by the defendants, is distinguishable. In *Marcello*, it was impossible for the panel to determine whether the jury found two valid predicate acts because the jury returned a general verdict. *Id.* at 1153. That is not the case here. The jury in this case was given a special verdict form with respect to the RICO counts. In addition to predicate acts 5A-B, 5E-G (those tainted by the "license as property" theory), the jury expressly found proven predicate acts 4A, 4B and 4C and 6 as to Stephen Edwards, Edwin Edwards and Martin and predicate acts 3A, 3B, 3C and 3D as to Edwin Edwards and Stephen Edwards. *Cf. United States v. Biaggi*, 909 F.2d 662, 692 (recognizing that "the jury's findings of two predicate acts, lawfully constituting a RICO pattern, and of the other elements of a RICO offense, will permit affirmance of a RICO conviction notwithstanding the invalidation of other predicate acts" but concluding, without citing authority or providing reasoning, that affirmance was inappropriate because in their case the invalid allegations "dominated this prosecution."); *United States v. Delano*, 55 F.3d 720, 728 (2d Cir. 1992) (same) (citing *Biaggi*).

D.

Finally, Martin contends that reversal of his Count 34 conviction requires that his RICO convictions be reversed because the jury will have found him to have committed only one Racketeering Act. This argument is wholly dependant [sic] on our reversal of Martin's conviction on Count 34. Because we will affirm Martin's Count 34 conviction, his argument fails. We note, however, that even had we reversed Martin's conviction on Count 34, his RICO conspiracy conviction clearly would have been unaffected. *See Salinas*, 522 U.S. at 64.[23]

IX.

Pursuant to a special verdict form, the district court found Stephen Edwards jointly and severally liable for a $1.8 million forfeiture award. Of that $1.8 million, $327,000 was attributed to the LRGC/NORC scheme. The jury had earlier found that the government had failed to prove any predicate acts relating to the LGRC/NORC scheme as to Stephen Edwards or Edwin Edwards.

At sentencing the district court, applying U.S.S.G. §§ 2C1.1 & 2F1.1, concluded that the loss attributable to Stephen Edwards was $4,117,000, resulting in an upward adjustment of 13 levels. Of this $4,117,000, $2,217,000 was attributed to the Players Scheme and $1.9 million was

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[23] Johnson also contends that *Cleveland* invalidates his extortion conviction because after *Cleveland*, loss of a license is not an economic harm. We reject this unsupported assertion. *Cleveland* has nothing to do with extortion and therefore has no effect on the law respecting what constitutes a threat of economic harm. As discussed above, the inability to compete for a license clearly constitutes an economic loss regardless of whether a license is property in the hands of the government. *See Collins*, 78 F.3d at 1030-31.

attributed to the other schemes.[24] The $2,217,000 figure included $200,000 that was allegedly extorted from Patrick Madamba, $180,000 paid in legal fees to Stephen Edwards and payments (of some amount not specified by the briefs) made to Shetler by "Jebaco" and "Beeber." All of the money attributed to the Players Scheme (except the $180,000 in legal fees aforementioned) was paid first to Shetler; at Shetler's sentencing, Judge Parker found Shetler responsible only for between $300,000 and $500,000 in loss. Stephen Edwards contends that it would violate his Fifth Amendment right to due process and Eighth Amendment protection against excessive fines to base a forfeiture order on conduct that the jury found "not proven." Stephen Edwards further contends that the $2,217,000 figure was overstated. In support of this contention, he asserts that it is inconsistent for Judge Parker to find $300,000 to $500,000 in loss from the Players Scheme and Judge Polozola to find $2,217,000. In addition, Stephen Edwards asserts that the record does not support a finding that the three classes of payments mentioned above (the Madamba payments, legal fee payments, and Jebaco and Beeber payments) were the proceeds of illegal activity.

A.

The $1.8 million forfeiture amount constitutes the amount the jury found to have been the proceeds of racketeering activity. Stephen Edwards was found to have been a member of that racketeering conspiracy. Accordingly, the district court appropriately entered an order of forfeiture,

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[24] The sum of $1.5 million was attributed to the Treasure Chest Scheme, consisting of an intended 15 monthly payments of $100,000. Four hundred thousand dollars was attributed to the 15th Riverboat License Scheme. Though unchallenged, these amounts are supported by the record.

for which Stephen Edwards was solidarily [sic] liable. See *United States v. Corrado*, 286 F.3d 934, 937-38 (6th Cir. 2002) (*Corrado II*) (holding that a RICO forfeiture verdict may provide for joint and several liability and that conspirators are liable even for proceeds of crimes not part of the conspiratorial enterprise); *see also United States v. Simmons*, 154 F.3d 765, 769-770 (8th Cir. 1998) (providing for joint and several liability); *United States v. Hurley*, 63 F.3d 1, 22 (1st Cir. 1995) (same); *United States v. Caporale*, 806 F.2d 1487, 1507 (11th Cir. 1986) (same).

Contrary to his assertion, Stephen Edwards is not being punished for committing the substantive acts found to be "not proven." He is being punished for conducting the affairs of an enterprise through a pattern of racketeering activity. The jury found that he and Brown were RICO co-conspirators and that Brown, as part of that conspiracy, extorted money pursuant to the LGRC/NORC scheme. Accordingly, the money extorted constitutes the proceeds of the enterprise. Therefore, Stephen Edwards is appropriately held responsible for that loss. Though not involving an "acquittal,"[25] the opinion in *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (*Corrado I*) is instructive. In *Corrado I*, two mobsters convicted of RICO asserted that they should not be liable for any forfeiture award because they did not participate in any of the illegal conduct, received none of the proceeds and the gangsters who committed the acts and received the proceeds were acting to further their own agenda. The Sixth Circuit rejected these arguments, reasoning that "it is not determinative that the defendant committed the crime to further his own agenda, if indeed he was only able to commit the crime by virtue of his position within the enterprise." *Id.* at 553-55. The only requirement

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[25] As the LGRC/NORC predicates were not charged as substantives [sic] offenses, technically Stephen Edwards was not acquitted.

is that the criminal conduct be foreseeable. *Id.* at 558. Similarly, Brown's ability to extort money from LRGC/NORC clearly came from his position in the RICO enterprise. Without his connection to the enterprise, his threats would have lacked substance.

B.

U.S.S.G. § 2C1.1 provides a base offense level of 10 for extortion. This level is to be increased by the corresponding number of levels provided by U.S.S.G. § 2F1.1, which provides for a thirteen-level increase for loss amounts between $2,500,001 and $5,000,000.

Although the determination of loss for the purposes of U.S.S.G. § 2F1.1 is a factual finding reviewed for clear error, the district court's choice of the method by which losses are determined involves an application of the sentencing guidelines, which is reviewed *de novo*. *United States v. Saacks*, 131 F.3d 540, 542-43 (5th Cir. 1997).

Stephen Edwards does not contend on appeal that the $1.9 million figure found by the district court with respect to the other schemes is inaccurate. In addition, the jury found, and the evidence supports, a finding that Shetler funneled at least $550,000 in extortion proceeds from the Players Scheme to Edwin and Stephen Edwards. There was substantial evidence in the record that Shetler kept at least one-third of all the proceeds of the Players Scheme. Extrapolating from this evidence, this would amount to, at minimum, an additional $225,000 that Shetler obtained through the extortion scheme, which constitutes part of the actual loss caused by the scheme. As the sum of $225,000, $550,000 and $1.9 million exceeds $2,500,001, any error by the district court in including additional monies, assuming one occurred, was harmless. Finally, as to Judge Parker's finding that Shetler was responsible for only $300,000 to

$500,000 in loss, Stephen Edwards fails to cite any authority for why this finding, which relied on a completely different record, is legally significant.

X.

At sentencing, the district court found that Johnson intended to extort a 12.5% interest in the Belle of Baton Rouge, Jazz's riverboat project. It then calculated Johnson's "intended loss" for the purposes of the sentencing guidelines by summing 12.5% of $11,105,000, the Belle's net profits,[26] with 12.5% of $55.9 million, the amount paid by an outside party for Jazz Enterprises' interest in the Belle and the dockside development Catfish Town. In addition, the district court adjusted Johnson's offense level for obstruction of justice pursuant to U.S.S.G. § 3C1.1.

Johnson contends that the record does not support the district court's finding that he intended to extort a 12.5% interest in the entire Jazz riverboat project, including Catfish Town. Instead he contends that the record supports a finding that he intended to extort a 12.5% interest only in the casino. In addition, Johnson contends that the district court erroneously failed to require the government to provide evidentiary support for the pre-sentence reports' $11,105,000 and $55.9 million figures.[27] Finally, Johnson contends that

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[26] In his brief, Johnson erroneously asserts that the pre-sentence report recommended a finding that there was $5.7 million in profits.

[27] Johnson may also contend that the loss figure is incorrect because Jazz could not have delivered a 12.5% interest in the Belle because it only owned 10%. To the extent that Johnson is making this argument, the government is correct that nothing in § 2F1.1 n.7 requires that the defendant be capable of inflicting the loss he intends. *See United States v. Ismoila*, 100 F.3d 380, 396 (5th Cir. 1996) (citing *United States v. Robinson*, 94 F.3d 1325, 1328 (9th Cir. 1996) for the proposition that "§ 2F1.1 does not require the loss the defendant intended to inflict be

the record does not support an adjustment for obstruction. He bases this contention on the fact that the government knew his statements were false at the time they were made. Therefore, he concludes, his false statement did not actually obstruct justice.

A.

Again, the district court's loss finding is reviewed for clear error. *United States v. Loe*, 262 F.3d 427, 437 (5th Cir. 2001). "In order to satisfy this clear error test all that is necessary is that the finding be plausible in light of the record as a whole." *United States v. Humphrey*, 104 F.3d 65, 71 (5th Cir. 1997). "A 'loss' under [U.S.S.G. 2F1.1] means the actual or intended loss to the victim, whichever is greater. Further, the amount of loss need not be determined with precision. The district court need only make a reasonable estimate given the available information." *United States v. Izydore*, 167 F.3d 213, 222 (5th Cir. 1999).

Finally, "[t]he presentence report is considered reliable evidence for sentencing purposes." *United States v. Clark*, 139 F.3d 485, 490 (5th Cir. 1998). "If no relevant affidavits or other evidence is submitted to rebut the information contained in the PSR, the court is free to adopt its findings without further inquiry or explanation." *United States v. Jefferson*, 258 F.3d 405, 413 (5th Cir. 2001).

The district court's finding that Johnson intended to extort 12.5% of the entire Jazz project is not clearly

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realistically possible"); *but see United States v. Watkins*, 994 F.2d 1192, 1196 (6th Cir. 1993) (holding, contra, that defendant must have been able to cause the loss); *United States v. Galbraith*, 20 F.3d 1054 (10th Cir. 1994) (same). *Cf. United States v. Geevers*, 226 F.3d 186, 195 (3d Cir. 2000) (characterizing *Galbraith* and *Watkins* as the minority rule and declining to follow them).

erroneous. Bradley, the Jazz principal extorted by Johnson, testified to this fact. Furthermore, the court was entitled to adopt the pre-sentence report's $11,1 05,000 and $55.9 million figures without further inquiry as Johnson failed to offer rebuttal evidence.[28]

B.

"A finding of obstruction of justice under § 3C1.1 is a factual finding reviewed for clear error. However, we review the district court's interpretation or application of the sentencing guidelines de novo." *United States v. Upton*, 91 F.3d 677, 687 (5th Cir. 1996).

The government correctly asserts that the obstruction enhancement was supported by Johnson's conviction on the false statements counts. U.S.S.G. § 3C1.1 & Application n. 4 ("This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct."); *United States v. Crisci*, 273 F.3d 235, 240 (2d Cir. 2001) ("In this case, Crisci's separate count of conviction for making false statements to the FBI agent investigating the instant offense compelled the district court to apply Section 3C1.1.") (citing Application note 4); *United States v. Herr*, 202 F.3d 1014, 1017 (8th Cir. 2000). As discussed in Section F, *supra*, the

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28 In addition, we note that, contrary to his position on appeal, Johnson did not explicitly or implicitly object to the figures themselves, he objected only to using them in calculating the loss, e.g., as discussed, he contended that 12.5% of $55.9 million was not the intended loss because he did not intend to extort an interest in the entire project, not that $55.9 million was not the sale price of the entire project. Accordingly, Johnson had the burden of demonstrating plain error. *See United States v. Fierro*, 38 F.3d 761, 774 (5th Cir. 1994).

false statements convictions are supported by the evidence.[29] Accordingly, the adjustment was proper.

United States v. Surasky, 976 F.2d 242, 245 (5th Cir. 1992), cited by Johnson, is distinguishable because there was no false statement conviction. In *Surasky*, this Court held "that a false statement made by a defendant to law enforcement officers cannot constitute obstruction of justice unless the statement obstructs or impedes the investigation at issue significantly." *Id.* In so holding, the panel relied on the language of then-Application Note 4(b),[30] which provided that "making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies" is not conduct warranting application of the enhancement, and the language of then-Application Note 3(g),[31] which instructs that "providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigations or prosecution of the instant offense" does warrant application of the enhancement. However, Application Note 5 instructs that it applies only absent conviction. *See* U.S.S.G. § 3C1.1 Application Note 5 ("Some types of conduct ordinarily do

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[29] We note that § 3C1.1 is clearly applicable to cases where the defendant does not actually obstruct justice. U.S.S.G. § 3C1.1 ("If (A) the defendant willfully obstructed or impeded, ***or attempted to obstruct or impede***, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (I) **[sic]** the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.") (emphasis added).

[30] The application notes were subsequently amended. This language now appears in Application Note 5(b).

[31] This language now appears in Application Note 4(g).

not warrant application of this adjustment.... However, if the defendant is convicted of a separate count for such conduct, this adjustment will apply and increase the offense level for the underlying offense...).

XI.

Martin contends that we must vacate the forfeiture order as to him if we vacate his money laundering and RICO convictions. He also contends that it should be vacated because he speculates based on his jury argument and the amount of the forfeiture award that the jury did not intend to award a forfeiture verdict as to him.

Because we affirm Martin's RICO and money laundering convictions, the former challenge fails. As to the latter, the jury explicitly found Martin liable on the forfeiture verdict. Martin's speculative attack, which is unsupported by authority or a record citation and contrary to the verdict, is frivolous.

XII.

Finally, the defendants contend that various errors infected the entire prosecution, violating due process. The government interprets this argument as urging reversal based on judicial bias, but the defendants' assert [sic] in reply that they do not seek reversal based solely on judicial bias.[32]

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32 The defendants' reluctance to rely on judicial bias is not surprising in light of their citation to *United States v. Jordan*, 49 F.3d 152, 158 (5th Cir. 1995). In *Jordan* this Court made clear that the failure of ajudge to recuse herself pursuant to 28 U.S.C. § 455(a) does not provide a basis for reversal absent evidence of actual bias or a nexus between actual errors and the appearance of bias. *See id.* at 158.

We construe the defendants' argument as asserting that reversal is appropriate for "cumulative error." *United States v. Williams*, 264 F.3d 561, 572 (5th Cir. 2001) ("We have previously recognized the so-called cumulative error doctrine under which an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial.") (citation omitted). *See also United States v. Sepulveda*, 15 F.3d 1161, 1195-96 (1st Cir. 1993) (explaining the cumulative error doctrine).

Many of the "errors" cited by the defendants are unbriefed. These issues have been waived. *See United States v. Thames*, 214 F.3d 608, 611 n.3 (5th Cir. 2000); *see also* Fed. R. App. P. 28(a)(9)(A) (appellant's brief must contain his "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies."). Because, based upon our discussion above, the defendants' arguments on appeal establish only two unrelated and relatively insignificant errors, there are no errors to cumulate. *See United States v. McIntosh*, 280 F.3d 479, 484 (5th Cir. 2002).

CONCLUSION

For the foregoing reasons, the defendants' convictions and sentences are hereby AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30036

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

EDWIN EDWARDS; STEPHEN EDWARDS; CECIL BROWN; ANDREW MARTIN; BOBBY JOHNSON

Defendants – Appellants

Appeals from the United States District Court for the Middle District of Louisiana, Baton Route

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ON PETITIONS FOR REHEARING EN BANC

(Opinion August 23, 2002, 5 Cir., ___, _____ F.3d ____)

Before HIGGINBOTHAM, WIENER, AND BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petitions for Rehearing En Banc as to Cecil Brown and Bobby Johnson as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of

the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions for Rehearing En Banc as to Cecil Brown and Bobby Johnson as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/

United States Circuit Judge

Judges Edith B. Clement and Carl E. Stewart did not participate in this consideration of the petitions for rehearing en banc.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30036

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

EDWIN EDWARDS; STEPHEN EDWARDS; CECIL BROWN; ANDREW MARTIN; BOBBY JOHNSON

Defendants – Appellants

Appeals from the United States District Court for the Middle District of Louisiana, Baton Route

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ON PETITIONS FOR REHEARING AND REHEARING EN BANC

(Opinion August 23, 2002, 5 Cir., ___, _____ F.3d ____)

Before HIGGINBOTHAM, WIENER, AND BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) The Petitions for Rehearing as to Edwin Edwards, Stephen Edwards, and Andrew Martin are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R.) the Petitions for Rehearing En Banc are also DENIED.

( ) The Petitions for Rehearing as to Edwin Edwards, Stephen Edwards, and Andrew Martin are DENIED and the court, having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA **CRIMINAL ACTION**

VERSUS

BOBBY JOHNSON **No. 98-165-B-M2**

RULING ON BOBBY JOHNSON'S MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL FOR BEING TRIED IN ABSENTIA

I. Background

The defendant, Bobby Johnson, claims he is entitled to a new trial because the Court erred in granting the government's motion to try him in absentia.[1] After conducting appropriate hearings during and after the trial,[2] the Court finds as a matter of fact and law for reasons which follow that: (1) Johnson knowingly and voluntarily absented himself from the trial; and (2) the public interest in proceeding with this lengthy, complex, multi-defendant trial clearly outweighed the interest of the voluntarily absent

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[1] Johnson has also asserted numerous other claims in support of his motion for a judgment of acquittal and, in the alternative, a motion for a new trial. These claims have been addressed in a separate opinion rendered this date.

[2] As the Court noted during the course of these proceedings, this was a very difficult issue to resolve. For this reason, the Court made numerous inquiries and conducted many hearings before making a final decision during the trial. *See, e.g.*, Rec. Doc. No. 1566, PP. 20; 23-24 (Tr. 4/4/00).

defendant in being present at the trial. In short, the Court finds that: (1) Johnson knowingly and intentionally, and as a matter of trial strategy, proceeded to trial with full knowledge of his need for bypass surgery;[3] and (2) failed to disclose to the Court prior to trial and prior to his surgery that the same surgery which was performed during the trial had been scheduled in September of 1999 and cancelled by the defendant. The Court further finds that based on: (1) the credibility findings made by the Court; (2) the suspicious timing of the surgery; (3) the failure, or refusal, of defendant Johnson to return to court after his surgery ~~or to accept~~ any of the many accommodations offered to the defendant before and after his surgery; and (4) the defendant's failure to request continuance, or to request the opportunity to present additional evidence as permitted by the Court at the close of all of the defendants' evidence, constituted a waiver of Johnson's right to be present for the trial. It is clear the Court had great difficulty in even pinning down the defendant on what relief he wanted the Court to grant.

The Court also finds that there would have been great difficulty in rescheduling this very lengthy, complex, multi-defendant trial and that a second trial would pose the very

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[3] Pat Fanning, Johnson's attorney, even refused to move for a mistrial on March 21, 2000 for the same reason, stating:

> I suggested to him that we may have to file a motion for a mistrial, and he has instructed me not to, because he wants to go forward. I think Mr. Johnson thinks that is a tactical matter, and I don't know that I can disagree with him on this; that his best chance of success in this trial rests with staying with the rest of the group because there may be some good will that rubs off with some of the jurors, with particularly one of the defendants, one of his co-defendants. He wants to go forward, and has told me not to file any motions on his behalf.

Rec. Doc. No. 1587, pp. 18-19 (Tr. 3/21/00).

real possibility of inconsistent verdicts. A severe burden would be placed on the government if a second trial was ordered, given the tremendous overlap in the evidence presented against all seven defendants. There also would have been a serious and unnecessary inconvenience placed on the jury selected to try this case and on any future jury.[4] Considering the amount of publicity generated by the first trial, it is certain that even more time and more prospective jurors would be required for a second trial.

Finally, the Court was faced with the following at the time Johnson elected to have his surgery: (1) the government's evidence on the counts brought against him not only established strong evidence of guilt, but the government had completed its evidence on the charges against Bobby Johnson; (2) Johnson would not waive his presence as he had done on numerous occasions throughout the trial; (3) even though Johnson would not waive his presence, he first filed, then withdrew, a request for a continuance and then filed, withdrew, and then re-filed a motion for a mistrial; (4) the government was close to completing its case in chief against all defendants; (5) Johnson's co-defendants were asking the Court to proceed with the trial and objected to any delay; (6) there were illnesses and other problems associated with the jury, which had reduced the number of alternate jurors available to the Court[5] (7) the trial had taken a substantial

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[4] Jury selection in this case took eight days. The voir dire consisted of approximately 2,000 pages of transcript. A total of 501 prospective jurors were initially sent questionnaires and as many as 125 prospective jurors were required to come to court on a single day.

[5] This was a great concern to the Court because the parties had not stipulated to a jury of less than twelve and the provisions of Fed. R. Cr. P. 23(b) could not be invoked at this time because the jury had not begun its deliberations. Later, the Court did have to use Rule 23(b) when a juror was excused during the jury's deliberations.

amount of time; (8) numerous pleadings and trial documents had been filed in the case; (9) many pre-trial hearings had been conducted at great expense to the parties and the Court; (10) a number of witnesses had testified at the trial, and there was concern on the part of some of these witnesses because of their prior personal, employment, or business relationship with some of the defendants; and (11) the Court did not learn until after the surgery had been performed that Johnson had been scheduled for the same surgery, by the same cardiovascular surgeon, in September of 1999 which had been cancelled by Johnson without advising the Court.[6] Faced with the above information at the time it made its decision, and exercising its narrow discretion under the jurisprudence, the Court found that the undue and substantial prejudice and inconvenience to Johnson's co-defendants, the government, the witnesses, the jury, the public, and the administration of justice, would far exceed any prejudice sustained by Johnson's inability, or refusal, to attend the trial from which Johnson knowingly and voluntarily absented himself.

An examination of the applicable legal standards is necessary. Thereafter, the Court will set forth, in detail, the facts as determined by the Court. When making its factual determinations, the Court did take into consideration the credibility of the witnesses who testified on this issue.[7]

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6 Had the Court known that the surgery had been scheduled and cancelled in September of 1999, the Court would have had the opportunity to conduct hearings and make appropriate medical inquiries to see if the surgery had to be held, whether the trial should be delayed, and whether Johnson's absence during the trial would constitute a waiver. See also Rec. Doc. No. 1590, p. 4 (Tr. 3/23/00).

7 The Court has considered all of the legal and factual contentions of the parties whether specifically discussed herein or not.

II. APPLICABLE LEGAL STANDARDS

It is well settled that a defendant has a constitutional right to be present at all stages of his trial.[8] However, this right is not absolute and can be waived by the defendant.[9] In *Diaz v. United States*,[10] the United States Supreme Court authorized an exception to the general rule that a criminal defendant must be present, because "it does not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up trial already commenced."[11] The *Diaz* court further held:

> [W]here the offense is not capital and the accused is not in custody, ... if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.[12]

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[8] Taylor v. United States, 414 U.S. 17, 94 S. Ct. 194, 38 L.Ed.2d 174 (1973).

[9] Diaz v. United States, 223 U.S. 442, 445, 32 S. Ct. 250, 251, 56 L.Ed. 500 (1912); United States v. Davis, 61 F.3d 291 (5th Cir. 1995), cert. denied, 516 U.S. 1135, 116 S. Ct. 961, 133 L.Ed.2d 883 (1996).

[10] 223 U.S. 442, 445, 32 S. Ct. 250, 251, 56 L.Ed. 500 (1912).

[11] *Diaz*, 223 U.S. at 457, 32 S. Ct. at 254 (quoting Falk v. United States, 15 App. D.C. 446, 454 (1899)). This exception was eventually codified in Rule 43(b) of the Federal Rules of Criminal Procedure.

[12] *Id.* at 455, 32 S. Ct. at 254 (citations omitted).

The propriety of conducting a trial without the defendant's presence is governed by Fed. R. Cr. P. 43, which provides, in relevant part:

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict and the imposition of sentence, will not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere, (1) is voluntarily absent after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial) . . . .

* * *

The United States Supreme Court upheld the constitutionality of Rule 43, as it then read, in *Taylor v. United States*.[13]

The Fifth Circuit Court of Appeals has decided a series of cases which set forth the standards a district court must follow in determining whether to proceed with trial in the defendant's absence.[14] In general, "the district court

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[13] 414 U.S. 17, 94 S. Ct. 194, 38 L.Ed.2d 174 (1973). There have been five amendments to Rule 43 since that time.

[14] United States v. Davis, 61 F.3d 291 (5th Cir. 1995), *cert. denied*, 516 U.S. 1135, 116 S. Ct. 961, 133 L.Ed.2d 883 (1996); United States v.

must determine (1) whether the defendant's absence is knowing and voluntary, and (2) if so, whether the public interest in the need to proceed clearly outweighs that of the voluntarily absent defendant in attending the trial."[15] The Fifth Circuit reviews "the district court's finding that the defendant's absence is voluntary for clear error."[16] "The decision to proceed without a voluntarily absent defendant is reviewed for an abuse of discretion."[17] As the Second Circuit has stated:

> The decision as to whether the defendant's voluntary absence from the trial amounts to a waiver is thus vested in the sound discretion of the trial judge, who is usually in a superior position to evaluate the evidence, including witnesses' credibility, because of familiarity with the background and circumstances. Moreover, where an evidentiary hearing is conducted to examine these circumstances, the trial judge's findings which form the basis of his or her decision on the issue will not be

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Krout, 56 F.3d 643 (5th Cir. 1995), *cert. denied*, 516 U.S. 1076, 116 S. Ct. 782, 133 L.Ed.2d 733 (1996); United States v. Hernandez, 842 F.2d 82 (5th Cir. 1988); United States v. Beltran-Nunez, 716 F.2d 287 (5th Cir. 1983); United States v. Martinez, 604 F.2d 361 (5th Cir. 1979); United States v. Benavides, 596 F.2d 137 (5th Cir. 1979); Smith v. United States, 357 F.2d 486 (5th Cir. 1966).

[15] *Davis*, 61 F.3d at 302. *See also Benavides*, 596 F.2d at 139.

[16] *Davis*, 61 F.3d at 302.

[17] *Id.*

disturbed unless found to be clearly erroneous.[18]

A trial court may proceed with a trial when a defendant, who is initially present, voluntarily absents himself after the trial has commenced.[19] However, a finding that the absence was voluntary does not end the inquiry. The Fifth Circuit has noted that "the [trial] court has 'only a narrow discretion' in deciding whether to proceed with a trial when the defendant is voluntarily [absent]."[20] In short, "[t]he trial judge must inquire into the reason for the defendant's absence and determine whether it constitutes a voluntary waiver of the right to be present."[21] "Although not expressly decided by this court [the Fifth Circuit], other courts have held that voluntariness can be implied from the actions of the defendant."[22] Furthermore, when an accused does not appear at a time when he knows he

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[18] United States v. Pastor, 557 F.2d 930, 934 (2nd Cir. 1977).

[19] Fed. R. Cr. P. 43 (b) (1).

[20] United States v. Benavides, 596 F.2d 137, 139 (5th Cir. 1979) (quoting Smith v. United States, 357 F.2d 486, 490 (5th Cir. 1966)).

[21] United States v. Davis, 61 F.3d 291, 302 (5th Cir. 1995). *See also* United States v. Beltran-Nunez, 716 F.2d 281, 291 (5th Cir. 1983).

[22] Davis, 61 F.3d at 302. *See also* United States v. Watkins, 983 F.2d 1413, 1419-20 (7th Cir. 1993), *cert. denied*, 525 U.S. 911, 119 S. Ct. 255, 142 L.Ed.2d 209 (1998).

should, "the absence will be found voluntary under Rule 43 'in the absence of some compelling excuse.' "[23]

After determining the absence was voluntary, the Court has narrow discretion to decide whether or not to proceed with the trial. In the exercise of this "narrow discretion" the district court must follow the standard set forth by the Fifth Circuit in *United States v. Benavides.*[24] In *Benavides,* which adopted the standard approved by the Second Circuit in *United States v. Tortora,*[25] the Fifth Circuit held:

> Whether the trial will proceed will depend upon the trial judge's determination of a complex of issues. He must weigh the likelihood that the trial could soon take place with the defendant present; the difficulty of rescheduling, particularly in multiple-defendant trials; the burden on the Government in having to undertake two trials, again particularly in multiple-defendant trials where the evidence against the defendants is often overlapping and more than one trial might keep the Government's witnesses in substantial jeopardy. This analysis is cogent. It fails to mention expressly inconvenience to jurors,

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[23] *Davis,* 61 F.3d at 302 (quoting United States v. Tortora, 464 F.2d 1202, 1210 (2nd Cir.), *cert. denied,* 409 U.S. 1063, 93 S.Ct. 554, 34 L.Ed.2d 516 (1972)).

[24] 596 F.2d 137 (5th Cir. 1979).

[25] 464 F.2d 1202 (2nd Cir.), *cert. denied,* 409 U.S. 1063, 93 S. Ct. 554, 34 L.Ed.2d 516 (1972).

> which we would add to the considerations; but, with this addition, we agree with it.[26]

In *United States v. Beltran-Nunez*,[27] the Fifth Circuit explained its holding in Benavides as follows:

> The teaching of Benavides and the cited jurisprudence of other circuits is that the important constitutional right of a criminally accused to be present at his trial cannot cursorily, and without inquiry, be deemed by the trial court to have been waived simply because the accused is not present when he should have been. Before exercising its narrow discretion to commence or continue the trial in the defendant's absence, the trial court must at the time make a record inquiry to attempt to ascertain the explanation for the absence of the accused and whether, balancing the likelihood that the trial could soon take place with the defendant's presence against the undue inconvenience or prejudice occasioned by a slight delay or a rescheduling of the trial, the district court could properly exercise its narrow discretion.[28]

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[26] 596 F.2d at 139-140.

[27] 716 F.2d 287 (5th Cir. 1983).

[28] 716 F.2d at 290. The *Beltran-Nunez* court was concerned that the trial judge took no affirmative steps to find the defendant and made no inquiry into the possibility of delaying the trial. In contrast, this Court took the extraordinary steps of conducting

Because the Fifth Circuit adopted the Second Circuit's test in *Benavides*, a discussion of relevant Second Circuit cases on this issue is in order. There are four key decisions by the Second Circuit which merit discussion: *United States v. Tortora*,[29] *United States v. Pastor*,[30] *United States v. Barton*,[31] and *Polizzi v. United States*.[32] The *Pastor*, *Barton* and *Polizzi* cases are strikingly similar to the facts of this case. Because the *Tortora* case was adequately discussed in the Fifth Circuit opinions, no further discussion of that case is required.

United States v. Pastor[33] involved a multi-defendant case. After adopting the standard set forth in *Tortora*, the Second Circuit noted that the Sixth Amendment "does not require the trial Judge to accept at face value a defendant's claim of inability to appear in court, particularly where other defendants are involved, and where the

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hearings, talking with doctors, granting continuances and setting forth a number of remedial alternatives to the defendant before deciding to grant the government's motion to try Johnson in absentia. After the trial, the Court conducted another hearing and permitted oral argument and the filing of additional briefs before ruling on Johnson's motion for a new trial. These matters will be discussed in more detail later in this opinion. *See also*, United States v. Hernandez, 842 F.2d 82 (5th Cir. 1988).

[29] 464 F.2d 1202 (2nd Cir.), *cert. denied*, 409 U.S. 1063, 93 S. Ct. 554, 34 L.Ed.2d 516 (1972).

[30] 557 F.2d 930 (2nd Cir. 1977).

[31] 647 F.2d 224 (2nd Cir.), *cert. denied*, 454 U.S. 857, 102 S. Ct. 307, 70 L.Ed.2d 152 (1981).

[32] 926 F.2d 1311 (2nd Cir. 1991).

[33] 557 F.2d 930 (2nd Cir. 1977).

government has spent considerable time, energy and money in preparing for trial and assembling witnesses and a panel of veniremen in the expectation that trial will proceed as scheduled."[34] Pastor had medical problems very similar to those of Bobby Johnson. Pastor complained of chest pains on September 10, 1975 and was hospitalized for approximately 10 days. Pastor's attorney attended a pre-trial conference with the trial judge on September 22. At this conference, the attorney gave the judge a letter from the defendant's physician, describing his heart condition and advising that "surgery within the next three or four months was being contemplated."[35] No surgery was performed prior to the trial which was originally scheduled to begin on January 15, 1976, but later postponed until February 13, 1976.

Similarly, Johnson went to the doctor complaining of chest pains on September 2, 1999, approximately four months prior to the commencement of his trial which was scheduled to begin on January 10, 2000. Tests were performed on Bobby Johnson on September 9, 1999. On the same date, Johnson met with Dr. Carlton H. Sheely, a cardiovascular surgeon who recommended surgery to repair six blocked arteries. On September 10, 1999, Johnson's attorney wrote a letter to the Court which stated that Johnson had learned that "he has six blocked arteries which are not treatable by any method other than bypass surgery. Beginning next week, Mr. Johnson plans to speak to several surgeons to schedule this procedure as soon as possible."[36] On September 13, 1999, the parties discussed Mr. Johnson's condition at a pre-

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[34] 557 F.2d at 934 (citations omitted).

[35] *Id.*

[36] Rec. Doc. No. 1231 (Govt. Exh. 6).

trial conference. Two days after the conference, and unknown to the Court, Dr. Sheely scheduled Johnson's surgery for September 24, 1999. This surgery was voluntarily cancelled by Johnson.

The trial judge in *Pastor* was forced to postpone the trial several times because of the defendant's illness. A trial date of May 17, 1976 was then set. The trial judge then set forth a list of accommodations to permit the defendant to be present for the trial, including limiting the trial to four hours per day, providing for a nurse and physician to be present and permitting additional recesses.[37] On May 17, 1976, a hearing was scheduled on pretrial motions. Jury selection was to begin on May 18. However, the defendant failed to appear. The court began the trial without the defendant present. Later the same day, Pastor went to the hospital complaining of chest pain. After conducting a hearing the court ruled that, based on "the totality of the circumstances," Pastor had voluntarily and without justification absented himself from the trial. After the trial was completed, the trial judge conducted another hearing. The Second Circuit affirmed the trial court's decision stating:

> Against Pastor's interest in postponing his trial, there were other weighty interests favoring the continuance of trial. More than 50 veniremen had been called and kept waiting on Monday, May 17, at considerable trouble and expense. Because of the small size of the courtroom in which the case was to be tried, which could not accommodate 50 potential jurors, another courtroom had to

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[37] This Court also offered similar accommodations to Johnson prior to and after his surgery.

> be borrowed by special arrangement for the selection of the jury. Pastor's co-defendant, Weiner, was entitled to proceed with trial rather than face the indefinite adjournment that would probably have otherwise occurred since, if the court had not ordered trial to proceed, Pastor would have remained hospitalized or resorted again to hospitalization. In the event of a severance the government would have been obligated to try the case, which took 12 days for trial, twice. In addition, the government had assembled its witnesses, including one elderly and enfeebled material witness, Dr. Horace Johnson. Lastly, Judge Motley had arranged her schedule and time for the trial and could hardly be expected to find another case ready for immediate trial.[38]

The *Pastor* court also found that the " 'uncontroverted and undisputed testimony', moreover, discloses that, despite the use by the hospital and doctors of medical terminology that may sound impressive to laymen (and apparently our colleague), **there was no appreciable change in Pastor's basic condition on the morning of May 18. It was essentially the same as it had been for months, if not for years . . . . In fact, there was no further injury to or alteration in the condition of his heart."**[39] The same may be said of Johnson's medical condition. As will be discussed in more detail later, Dr. Sheely and Dr. Deumite both testified, at hearings conducted during and after the trial, that Bobby Johnson's medical condition on the day he had

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[38] 557 F.2d 930, 938 (2nd Cir. 1977).

[39] *Id.* (emphasis added).

his surgery was the same as his condition was on September 9, 1999 when he met with Dr. Sheely. **The surgery that Dr. Sheely was scheduled to perform in September of 1999 was the very same surgery he actually performed in March of 2000.**

United States v. Barton[40] also presented similar facts. Barton was diagnosed seventeen months prior to the trial with a medical problem that required surgery. Surgery was performed on the eve of the trial. The trial court tried Barton in absentia. The Second Circuit affirmed the decision of the trial court. At a conference held on November 14, 1987, the court scheduled the trial to begin on January 8, 1988. Less than one week prior to the trial, Barton had surgery. The Second Circuit noted:

> [L]ess than one week before trial, Barton elected to undergo spinal surgery. At the hearing on Barton's severance motion Barton's physician testified that, while **medically** necessary, the operation was not performed on an emergency basis; that he had diagnosed Barton's condition in August 1978, some 17 months earlier, and had several times thereafter unsuccessfully urged Barton to undergo surgery. He stated that Barton's request for surgery in January 1980 came "out of the blue."[41]

In affirming the trial court, the Second Circuit further held:

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[40] 647 F.2d 224 (2nd Cir.), *cert. denied,* 454 U.S. 857, 102 S. Ct. 307, 70 L.Ed.2d 152 (1981).

[41] 647 F.2d at 238 (emphasis added).

> In light of this evidence, we find no error in Judge McMahon's conclusion that Barton's absence was voluntary. Given this fact and the fact that Barton was alleged to have participated in conspiracies with all of the other defendants except Betti Frassetto, and the additional circumstances that this multi-defendant trial involving more than 100 government witnesses had already been postponed more than once, that a panel of 250 veniremen had already been arranged, and that the trial judge was sitting by designation from another federal district, the trial court ruled that Barton's interest in being present at his trial was outweighed by the burdens that a postponement or severance would impose on the court, the government, the witnesses, the co-defendants, and the public. We find no abuse of discretion in the decision to proceed with trial despite Barton's absence.[42]

As with *Pastor,* the *Barton* case presents facts which are very similar to this case. Johnson knew of his medical condition and his need of surgery well before the trial began, as will be described in more detail. According to the medical records of Dr. Stephanie Cave, who was one of Bobby Johnson's doctors, Johnson reported feeling fine and stated he had no medical problems right up to the end of the government's presentation of evidence on the charges brought against him. When the government's case was completed, Johnson reported to Dr. Cave that he was having medical problems. This obviously caused the government and the Court to be suspicious of the timing of the surgery, as

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[42] *Id.*

was the trial judge in *Pastor*.[43] While the surgery in Barton and Johnson's cases were both "medically necessary," the suspicious timing of the surgery or hospitalization, when balanced with the totality of the circumstances, permitted the defendants in *Pastor* and *Barton,* as well as Bobby Johnson, to be tried in absentia.

Finally, the Court turns to a discussion of *Polizzi v. United States*.[44] *Polizzi* involved a "RICO megatrial" which "continued for seventeen months, consuming approximately 265 trial days, and concluding with the convictions of 18 of 22 defendants . . . The case produced over 40,000 pages of trial transcript, and involved the "introduction of thousands of exhibits and the testimony of more than 275 witnesses."[45] The trial involving Johnson was also a case that can best be described as one of extraordinary magnitude. The trial began on January 10 and ended on May 9. Over 501 prospective jurors were sent questionnaires. A second questionnaire followed and was sent to 332 qualified prospective jurors. Up to 125 prospective jurors were present in court during the eight days it took to select and empanel a jury. Over 2,000 pages of transcript were taken during jury selection. The docket sheet is 240 pages long and contains 1,698 separate documents filed in the case. As of the time this opinion is being written, approximately 17,268 pages of pleadings and other documents have been scanned by the clerk's office. As of the date the Johnson evidentiary hearing was held during the trial, 256 motions had been filed in the

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[43] *See* Rec. Doc. No 1588, pp. 15; 21-22 (Tr. 3/22/00); Rec. Doc. No. 1590, pp. 3-7; 11-15; 23-30 (Tr. 5/23/00); Rec. Doc. No. 1562, pp. 151-154 (Tr. 3/23/00).

[44] 926 F.2d 1311 (2nd Cir. 1991).

[45] *Id.* at 1313.

case. A total of eighty-four witnesses testified during seventy-two trial days. Approximately one thousand trial exhibits were admitted into evidence. Over 9,000 pages of transcript were taken over forty-three court days of pretrial proceedings. Approximately 10,000 pages of transcript were taken during, the trial, excluding voir dire. The voir dire required approximately 2,000 pages. There are over 20,000 pages of transcript for all of the pre-trial, trial and post-trial proceedings.

This Court, as did the trial judge in *Polizzi*, permitted the parties to take excused absences for medical treatment and other reasons. The Court required the parties to submit a written request which the Court granted early in the proceedings. This permitted the defendants to come and go as they pleased. An appropriate instruction was given to the jury.

Both this Court and the *Polizzi* court divided the case into various schemes to allow for better trial management and the presentation of evidence in a clear manner to the jury.[46] In both cases, there were long periods of time when a particular defendant's name was never mentioned. During the trial, Polizzi had "non-elective" surgery performed to remove a possibly cancerous lump on his throat. Polizzi was absent from the trial for approximately five weeks. The Second Circuit affirmed the trial court's decision, which found that Polizzi had voluntarily waived his appearance and that there was a controlling public interest to continue with the trial. Johnson also had medically necessary surgery, which he could have had prior to the trial.

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[46] This Court also allowed the parties to make "mini opening statements" to the jury before the presentation of evidence on a particular scheme.

This Court also finds that Johnson waived his appearance and there was a controlling public interest to continue the trial. Simply put, Johnson did what the Supreme Court said a defendant on bond could not do - "withdraw himself from the courts of his country and to break up a trial already commenced."[47] Despite the continuances granted by the Court, Johnson refused every accommodation offered to him. He refused to present testimony or ask for time to present evidence at the close of the defendants' case despite being granted the opportunity to do so. He refused to agree to a waiver of his appearance during a part of a case that did not pertain to him despite doing so earlier in the case. He failed to request a further delay in order to permit him to testify despite being offered the opportunity to do so.[48] He failed, or refused, to return to court in person or through any of the accommodations offered by the Court which would have allowed him to participate in the trial either at home or at the courthouse.

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[47] Diaz v. United States, 223 U.S. 442, 457, 32 S. Ct. 250, 254, 56 L.Ed.500 (1912).

[48] No proffer was ever offered to the Court, in camera or otherwise, as to the nature of Johnson's testimony or any other testimony or evidence Johnson would have presented.

A review of the jurisprudence reveals that the Fourth,[49] Seventh,[50] Eighth,[51] and Tenth Circuits[52] have followed a standard similar to that followed by the Second and Fifth Circuits in determining whether to allow a defendant to be tried in absentia.

With these legal principles as a backdrop, the Court now turns to an analysis of the evidence.

III. Findings of Fact

The parties and the Court agree that there are no disputes in the facts, up to the date of Johnson's bypass surgery.

A grand jury for the Middle District of Louisiana returned the initial indictment in this case on November 6, 1998. The original indictment charged seven defendants

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[49] United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), *cert. denied,* 423 U.S. 1088, 96 S. Ct. 881, 47 L.Ed.2d 99 (1976).

[50] United States v. Watkins, 983 F.2d 1413 (7th Cir. 1993), *cert. denied,* 525 U.S. 911, 119 S. Ct. 255, 142 L.Ed.2d 209 (1998).

[51] United States v. Crites, 176 F.3d 1096 (8th Cir. 1999) (defendant who attempted suicide was voluntarily absent).

[52] United States v. Edmonson, 962 F.2d 1535 (10th Cir. 1992), *cert. denied;* 521 U.S. 1128, 117 S. Ct. 2531, 138 L.Ed.2d 1030 (1997) (trying voluntarily absent defendant in absentia was proper where there was no evidence that the trial could soon take place with the defendant present, and the court found it would be an extreme burden upon the government to undertake two trials where the case would take at least four weeks and most if not all of the evidence against the defendant would overlap with evidence against the other defendants and it would be extremely difficult on the parties and the court to reschedule the trial). *See also,* United States v. Wright, 932 F. 2d 868 (10th Cir.), *cert. denied,* 502 U.S. 962, 112 S. Ct. 428, 116 L.Ed.2d 448 (1991).

with thirty-four counts of violations of the Racketeer Influenced Corrupt Organizations Act, extortion, mail fraud, wire fraud, money laundering, interstate travel and communications in aid of racketeering, false statements, illegal wiretapping and conspiracy. A superceding indictment added an additional defendant and charge. After the defendants entered not guilty pleas, the Court scheduled conferences with the parties. As a result of these conferences, the Court issued a scheduling order on December 3, 1998,[53] which was amended on March 10, 1999,[54] and set the case for trial with a jury on January 10, 2000.

During the pre-trial phase of the case, over 250 motions had been filed and numerous pre-trial hearings and conferences were held by the Court. It was the Court's belief that this very complex multi-defendant trial required very detailed case management orders, jury questionnaires and innovative trial techniques. The Court, for reasons assigned, ordered that an anonymous jury be used in the case. Thus, to save time and minimize inconvenience to the prospective jurors and to give the parties as much information as the Court could about prospective jurors, the Court sent an initial jury questionnaire to 501 prospective jurors. Thereafter, a second jury questionnaire was sent to 332 prospective jurors.

The Court also had the parties exchange numerous tape recordings, transcripts of tape recordings, and other discovery material which was to be potentially used as evidence in the case. During pre-trial conferences, the Court encouraged the parties to present the five different schemes

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[53] Rec. Doc. No. 36.

[54] Rec. Doc. No. 123. It was amended again on June 25, 1999. *See* Rec. Doc. No. 249.

charged in the indictment separately, to allow the jury to better understand the evidence. The parties were permitted to make mini-opening statements before the beginning of the presentation of each scheme.[55] Because of the numerous exhibits which were to be introduced at the trial, the Court used new electronic equipment which had been installed in the courtroom and ordered the parties to scan these exhibits on disk for ease in presentation. Orders were issued to permit the jurors to take notes because of the anticipated length and complexity of the trial.

In accordance with these procedures, the Court scheduled a conference for September 13, 1999. On September 2, 1999, Bobby Johnson was examined by Dr. Cefalu, a cardiologist, because he was experiencing chest pains.[56] Based on his initial examination, Dr. Cefalu recommended that Johnson have a cardiac catheterization performed on him. This procedure was performed on September 9, 1999 by Dr. Cefalu. Based upon his evaluation of the results of the cardiac catheterization, which indicated Johnson had a number of blockages in his arteries, Dr. Cefalu recommended that Johnson have surgery. Dr. Cefalu referred Johnson to Dr. Sheely, a cardiovascular surgeon.[57] Johnson was examined by Dr. Sheely on the same date, September 9, 1999. Dr. Sheely recommended that Johnson have bypass surgery to remove the six blockages. On September 10, 1999, Patrick Fanning, Johnson's attorney, sent a letter to the Court and to counsel for the government which notified them

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[55] These mini-opening statements were in addition to the regular opening statements and closing arguments which the Court allowed each party to make.

[56] Rec. Doc. No. 1231 (Govt. Exh. 1).

[57] Rec. Doc. No. 1231 (Govt. Exh. 2).

of Johnson's medical condition.[58] The September 10, 1999 letter from Fanning stated, in relevant part:

> I received a telephone call from my client, Bobby Johnson. Mr. Johnson informed me that he learned yesterday afternoon (September 9, 1999) that he has six blocked arteries which are not treatable by any method other than bypass surgery. Beginning next week, Mr. Johnson plans to speak to several surgeons to schedule this procedure as soon as possible.[59]

Fanning also stated in his letter that to "complicate matters, Mr. Johnson suffers from diabetes and is in overall poor health."[60]

As noted above, the Court scheduled a status conference on September 13, 1999 which continued over to September 14, 1999. During this conference, a number of matters were discussed, including the health needs of a number of the defendants in addition to Johnson.[61] A procedure was set up to allow the defendants to leave the courtroom, as the need arose, to accommodate the medical and other needs of the defendants. In addition, the Court

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[58] Rec. Doc. No. 1231 (Govt. Exh. 3).

[59] *Id.*

[60] *Id.*

[61] *See* Rec. Doc. No. 509 (Tr. 9/13/99) and Rec. Doc. 665 (Tr. 9/14/99).

received a supplemental report from Johnson's attorney about the status of Johnson's medical condition.[62]

The Court was obviously concerned about Johnson's health and the seriousness of the medical diagnosis. Fanning also indicated that surgery may be required. The Court strongly cautioned that Johnson should not delay obtaining the medical treatment and surgery he may be required to have. The Court stated that "if he [Johnson] has to have surgery, he has to have surgery. That's his business. That's the doctor's call, not mine."[63] Later, the Court advised Fanning that Johnson needed to "make a decision about his medical."[64] The Court also expressed its concern about any delay by Johnson in making his decision, stating: "I mean, I hope he doesn't say he's going to go in on January ninth," the day before the trial was to begin.[65] Except for learning that Johnson was leaving or not attending court to obtain chelation treatments, the Court received no further medical reports on Johnson's medical condition until March 15, 2000, some three months after the trial began and, noticeably, after the government had completed presenting its case on the Jazz Scheme, the only charges in which Johnson was named a defendant. This will be discussed in more detail later.

What is most disturbing to the Court was the failure of Johnson to advise the Court that, on September 15, 1999, only one day after the September 14, 1999 conference, Dr.

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[62] Rec. Doc. No. 509, pp. 61-64 (Tr. 9/13/99). Fanning also produced copies of cath. lab discharge documents and pictures of Johnson's angiogram at the conference.

[63] Rec. Doc. No. 509, p. 63 (Tr. 9/13/99).

[64] *Id.* at 64.

[65] *Id.*

Sheely sent Johnson a letter confirming that Johnson's bypass surgery had been scheduled for September 24, 1999. The letter stated, in pertinent part, that "Mr. Johnson . . . [is] scheduled to undergo a six vessel coronary artery bypass grafting on September 24, 1999."[66] Not only did Johnson fail to advise the Court of the fact that the surgery had been scheduled, he did not advise the Court of the fact that he cancelled the surgery on September 22, 1999. It was not until April of 2000, after Johnson had the surgery in March of 2000, that the Court and the government first learned of Dr. Sheely's September 15, 1999 letter and the fact that the surgery had been scheduled and later cancelled.

Not only did Johnson cancel his surgery scheduled for September 24, 1999, but he did not see a cardiologist or cardiovascular surgeon until he saw Dr. Joseph Deumite on March 22, 2000, after the presentation of the Jazz Scheme had been completed. Part of Johnson's decision not to have surgery, or otherwise see a cardiologist, was his desire and tactical trial decision to go to trial with the other defendants, particularly Edwin Edwards, because of his belief this would be a great advantage to him and all of the other defendants.

On September 30, 1999, Johnson elected to begin chelation therapy, without informing Dr. Cefalu or Dr. Sheely. While Johnson contends this was a legitimate course of treatment, Dr. Sheely, in his post-trial testimony, testified that he would not consider chelation treatment to be a recommended alternative to surgery and stated: "Quite frankly, it is quackery. . . . Chelation therapy is what I consider quackery."[67] . . . Dr. Deumite, a cardiologist who is currently treating Johnson and referred him to Dr. Sheely for

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[66] Rec. Doc. No. 1231 (Govt. Exh. 6).

[67] Rec. Doc. No. 1697, p. 101 (Tr. 12/7/00).

surgery in March of 2000, also testified in the post-trial hearing that he would not refer his patients for chelation treatment because it "does not have an approved efficacy and I think it prevents persons from obtaining standard care which has a proven efficacy."[68] The United States also introduced evidence that chelation treatment was unproven and unsafe.[69]

From September 24, 1999 until the time he saw Dr. Deumite in March of 2000, Johnson was treated by Dr. Cave and Dr. James P. Carter for his chelation treatments. Dr. Cave testified that she was not only Johnson's doctor, but she and her husband were personal friends of the Johnsons. The government points out that Dr. Cave's husband was an unindicted co-conspirator in the Jazz Scheme and prominently participated in one of the tapes played to the jury during the course of the trial.

There is nothing in the medical records to suggest that Johnson was having any problems, other than those revealed in the September, 1999 catheterization results, until March 15, 2000.

The trial of this case began on January 10, 2000. During the trial, most of the government's evidence against Johnson was presented during the Jazz Scheme phase of the trial.[70] Johnson was being treated by Dr. Cave while the trial was being conducted. The "Patient Progress Notes" which Dr. Cave maintained on Johnson provided, in relevant part, as follows:

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[68] Rec. Doc. No. 1697, p. 11 (Tr. 12/7/00).

[69] Rec. Doc. No. 1231 (Govt. Exh. 13, 14).

[70] Some evidence had been introduced during an earlier portion of the trial.

1-12-00	Pt. states feeling great, no complaints
	* * *
1-17-00	Pt states out of BP med - will get filled today - Also, ate breakfast before arriving. Did not check blood sugar this AM - No complaints
	* * *
1-27-00	No complaints - Pt states has been checking Blood sugar & is taking Glucotrol
	* * *
1-31-00	Pt states gast[?][71] symptoms over the weekend, put on Antibiotic - In NAO
	* * *
2-3-00	No complaints
	* * *
2-11-00	No complaints. Pt in very good spirits today. States feels good.
	* * *

[71] The Court was unable to read the entire word.

2-16-00	Pt states feels great - started taking [medicine][72] and is getting good results
	* * *
2-24-00	Pt had Vit. Repl on Monday per Dr. Cave - Pt states feeling fine –
	* * *
2-29-00	No complaints - Pt states has been under lots of stress this week –
	* * *
3-7-00	Pt. has no complaints today –
	* * *
3-15-00	Pt states having lots of trouble with BP lately, under lots of stress –
	* * *
3-20-00	Still having trouble with BP, states feels bad today - Under lots of stress.[73]

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[72] The Court was unable to read the name of the medicine.

[73] Rec. Doc. No. 1231 (Govt. Exh. 7).

On March 2, 2000, approximately two months after the trial began, the government began presenting its case against Johnson and the other defendants charged in the Jazz Scheme. The government completed its case related to the Jazz Scheme on March 13, 2000. During this period, neither Johnson nor his attorney reported any medical problems to the Court or to Dr. Cave. On March 15, 2000, two days after the government completed its case against Johnson on the Jazz Scheme, Johnson complained to Dr. Cave he was having problems with his blood pressure. On the afternoon of the same day, March 15, 2000, Johnson's attorney raised concerns about Johnson's health and his inability to sit through the trial proceedings. Johnson waived his presence for the afternoon of March 15, 2000.

On March 16, 2000, the court was advised that Johnson had high blood pressure and was not feeling well. Johnson's attorney also advised the Court that Johnson refused to see a cardiologist or seek other appropriate medical treatment. At this point, Fanning sought the Court's help in trying to convince Johnson to seek some type of medical treatment. The Court, concerned about the problem, discussed several alternatives with counsel. One of the alternatives discussed was having a local cardiologist appointed to examine Johnson.

Johnson again waived his presence for the afternoon of March 16, 2000. It must be noted that during this time, the United States was presenting evidence in a matter that did not relate to Johnson or the Jazz Scheme. On March 17 and 21, Johnson again left the Court at noon. He waived his presence on each of these days as he had done previously on numerous occasions. After Johnson left the Court on March 21, 2000, he did not return, even for the verdict which was returned on May 9, 2000, despite the numerous accommodations which the Court offered to him before and

after his surgery. Johnson also failed to present any evidence, seek further delay, or offer any proffers of testimony despite being given the opportunity to do so by the Court.

On March 21, 2000, the Court held the first of many conferences and hearings on Johnson's medical condition. At this time, the Court was advised that Johnson did not want to be examined by a cardiologist, and that he had not been treated by a cardiologist since his September 9, 1999 examination by Dr. Cefalu. Jim Cole, counsel for Edwin Edwards, noted during the conference that Johnson's "just not doing anything" insofar as obtaining proper treatment for his problems.[74] Cole suggested that the Court say to Johnson: "I'd like for you to be examined by a doctor, as a condition of your bond, so we can determine what to do."[75] Fanning also advised the Court that Johnson maintained that he wanted to testify in his defense. However, Johnson did not want a mistrial or severance because he thought it would be advantageous to be tried with the other defendants "because there may be some good will that rubs off."[76] During this conference, the Court offered the first of many accommodations to Johnson which would permit him to be properly treated and also to attend the trial. The Court offered to see if a doctor could be appointed to examine him. In addition to having a doctor appointed to examine and "stabilize this person", the Court offered to have "a home health nurse come up here and visit with him . . . three, four, five times a day. . . ."[77] The Court also would have allowed

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[74] Rec. Doc. No. 1587, p. 28 (Tr. 3/21/00).

[75] *Id.* at 23.

[76] Rec. Doc. No. 1587, pp. 18-19 (Tr. 3/21/00). *See also supra* note 3.

[77] Rec. Doc. No. 1587, p. 28 (Tr. 3/21/00).

Johnson to hire his own nurse, who would work under a doctor."[78] The Court also offered to delay the case to allow Johnson to go "in for another angiogram."[79] The Court made it very clear that Johnson "has to make his own decision."[80] However, the Court also expressed its concern that Johnson's refusal to seek medical treatment could cause delay or disruption of the trial and the effect it could have on the other defendants. The Court stated: "But I tell you, you know, I don't think it's fair to the other defendants to have the trial disrupted or delayed until he goes in."[81]

On March 22, 2000, the trial was delayed because one of the jurors was ill. The juror's illness, together with other problems the Court had been having with jurors, caused the Court great concern.[82] This concern about having sufficient jurors increased substantially because of Johnson's problems and was an important factor the Court took into consideration when it decided that Johnson had waived his presence and could be tried in absentia.

Although the Court could not conduct any trial proceedings on March 22, 2000, it did hold three conferences with the parties regarding Johnson's medical condition. During one of the conferences, the Court was advised that Johnson had been examined by Dr. Deumite, who

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[78] *Id.* at 29.

[79] *Id.* at 30.

[80] *Id.*

[81] *Id.*

[82] The trial transcript and other opinions rendered by the Court explain the problems the Court was having and the hearings the Court was required to conduct.

recommended that a heart catheterization be scheduled for later in the day. During the conference, the Court was also advised that, although he had waived his presence on numerous occasions in the past, including during the presentation of evidence against him in the Jazz Scheme, Johnson would no longer waive his presence at the trial. This was disturbing and suspicious to the Court, particularly considering the fact that the evidence being presented by the United States at that time did not pertain to Johnson. The government was also very close to resting its case in chief at that time. Because Johnson refused to waive his presence, he moved for a continuance.[83] The transcript of this conference reveals the Court's surprise and suspicions regarding Johnson's sudden change of position in not waiving his presence:

> **THE COURT:** So what -- so, do you want to proceed without him here tomorrow? You've been waiving it every other day.
>
> **MR. FANNING:** I understand that, Judge. And I asked Ms. Johnson what she wanted me to do about that tomorrow and she said that Mr. Johnson was awake. She went and talked to him. She came back and she said, Bobby said, he doesn't want you to waive his presence tomorrow.
>
> **THE COURT:** So, every day we have been waiving and tomorrow he doesn't?
>
> **MR. FANNING:** Judge, I had no conversation with the man. I can tell you as an officer of the court, I did not suggest anything.

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[83] Rec. Doc. No. 1588, p. 14 (Tr. 3/22/00).

THE COURT: This is beginning to remind me, with all due respect, of a baseball game where the catcher goes out and talks to the pitcher to get some delay. And then he comes back. Then the manager goes out. Then the manager goes back to the dugout, and then he goes back a second time to remove the pitcher.

MR. FANNING: Well, all I am telling you, Judge, is I did not make any suggestions to my client, that what do you want me to do about waiving his presence, and that was the message I got back from Ms. Johnson from him.

I think what they are concerned about, Judge, is that they don't know how long he is going to be unavailable and so they don't want me to waive his presence if it is going to be some extended period of time.

THE COURT: Why can't we do this on a day-by-day? He hasn't been here for this agent's testimony anyhow?

MR. FANNING: He has been there half-days for it, Judge. He comes every morning and then he gets sick at lunchtime and leaves, trying to make the whole day.[84]

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[84] *Id.* at 14-16.

THE COURT: I understand what you are saying. The thing that upsets me, and I apologize if I sound agitated, but I really, really am. I have bent over backwards to move this case and every -- I bet you for at least ten times, if not more, Mr. Johnson has missed trial at least ten times. And we are coming to the end of a witness that has said little or nothing about Mr. Johnson. And all of a sudden he doesn't want to waive. And it just -- he waived yesterday, he waived the day before, he waived I don't know how many times during the course of this trial.

Mr. [Johnson][85] has waived I don't know how many days during the trial, and all of a sudden, they don't want to waive. Well, something sounds funny to me now, in all due respect. And if you were in my position, you would say the same thing. I am glad the gentleman sought treatment personally. You know, if it's 80 percent blockages, he probably should have done this earlier.

The case that -- the civil case that we found which is at 903 F.2d 1154, which is a Seventh Circuit case, just said, hey, you knew what your problem was before you began the trial, and said the fact that you abused -- the judge did not abuse his discretion to proceed at trial when that defendant -- it happened to be the defendant -- was unavailable due to illness, and said he was no sicker on the day

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[85] The original transcript reflects that the Court erroneously referred to Mr. Brown when the Court meant Mr. Johnson.

he finally entered the hospital than he was on the day the trial was set. And so, if he already had all of these blockages earlier and he still has them now, you know, there is a problem. You know, and then there are some other cases out that we just have to take a look at.[86]

* * *

THE COURT: The one thing the record needs to be clear on, and I want to make sure I have been understanding what has been said to me yesterday on the record and in prior conferences we have had about this man. I understood Mr. Fanning and maybe even Mr. Johnson, but I am not going to tell you I absolutely heard it from Mr. Johnson, that prior to the trial he had four to six blockages already diagnosed and that he had turned down the surgery or didn't want to go back to talk about the surgery because they told him that if he got on the operating table he wasn't going to live or could possibly die on the operating table. And I think earlier this afternoon something else may have been suggested. I don't think you meant it that way, but it came across that possibly this is the first time that everybody knew that he had these blockages.

MR. FANNING: Judge, let me just quickly tell you that Dr. Deumite will have in his possession by tonight, if he doesn't already have it, the first angiogram. It's going

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[86] *Id.* at 21-22.

> to be a part of the medical record. There is no question that he had blockages earlier. If I said something that made it sound like I was getting away from that, I certainly didn't intend it.
>
> **THE COURT:** We as the staff thought, that - I don't know if you did it intentionally - we as the staff thought if somebody picked up the record and didn't know what was said yesterday or earlier that they might come away with that conclusion.[87]

The Court suspended the trial on March 23, 2000 to allow additional hearings to be conducted on whether the trial should proceed in Johnson's absence.[88] On this same date, the Court received a letter from Dr. Deumite[89] which indicated that Johnson "was in the process of being evaluated for coronary bypass surgery, which will be performed on Tuesday, March 28, 2000." [90] During one of the conferences, the Court again expressed its desire to proceed on a portion of the case which did not involve Johnson.[91] The Court also advised the parties that " . . . considering all

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[87] *Id.* at 33-34.

[88] The Court was making every effort to comply with the jurisprudence which requires the Court to make an appropriate inquiry to determine the applicability of the *Benavides* standard.

[89] The Court wanted to make sure it received the appropriate evidence as required by the jurisprudence. However, the Court also did not want anyone to interfere with the appropriate treatment Johnson should receive from his doctors. Rec. Doc. No. 1572, pp. 22-25 (Tr. 3/23/00).

[90] Rec. Doc. No. 1231 (Govt. Exh. 8).

[91] Rec. Doc. No. 1572, p. 26 (Tr. 3/23/00).

these other things that are going on, now you know why I was taking the position I'm taking. I really think we've got a problem with a juror."[92]

During a chamber conference that began at 8:30 A.M. on March 23, 2000, another discussion occurred about Johnson's refusal to waive his appearance even though the case being presented did not involve him. The conference also reflects the Court's surprise, concern and skepticism about Johnson's suddenly changed position:

> **MR. FANNING:** Okay. I got a phone call from my client's wife and him together last night sometime between eight-thirty and nine o'clock last night saying that they had just left Dr. Deumite and that Dr. Deumite told them that my client has one artery 100 percent blocked, two arteries 95 percent blocked, another artery that probably needs to be bypassed. It is not something that can wait. It is life threatening. And they want him to do the surgery tomorrow assuming they can get his blood pressure stabilized because all of the medications they have been giving him, they still can't control his blood pressure.
>
> I asked my client what he was going to do. He said the doctor told me I am going to die if I don't have the surgery. What can I do?
>
> So, as it stands now my client is anticipating surgery tomorrow. And he

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92 *Id.*

said if they can't get his blood pressure stabilized by tomorrow, that he anticipates that he will have the surgery Monday or Tuesday. And he told me that he fully intends and recognizes now that he has no options and that he has to go forward.

I asked him about his recovery period. He said Dr. Deumite said because of his diabetes[93] and other things, he thinks

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[93] As the Court noted earlier, credibility of the witnesses was taken into consideration by the Court. Although Johnson is claiming Dr. Deumite was concerned about how Johnson's diabetes would affect his recovery, Dr. Deumite testified in a post-trial hearing:

UNITED STATES: Now, did you learn from -- well, let me ask you this. Are you aware in your treatment of Mr. Johnson whether or not he suffers from any maladies other than cardiovascular heart disease?

DR. DEUMITE: He suffers from high blood pressure and high cholesterol.

UNITED STATES: Is hypertension -

DR. DEUMITE: Correct.

UNITED STATES: Does he suffer from that as well, or is that in addition to or is that -

DR. DEUMITE: That's the high blood pressure.

UNITED STATES: That is the high blood pressure. And did you say diabetic?

DR. DEUMITE: I did not say that. High cholesterol.

UNITED STATES: Okay. Are you aware that he is diabetic, or not.

DR. DEUMITE: I am not aware of that.

eight to ten weeks for a recovery period for this kind of surgery for a man in his condition. So, that's where I am.

Obviously, I am not in a position to waive his presence for the rest of the trial, and I don't have authority to waive his presence even today.

So, I think that I have -

THE COURT: This is the part that bothers me. And I can understand you can't waive it for the rest of the trial. This is the part that bothers me.

In the very portion of the case that dealt with him, he was seldom in the courtroom. He got up most of the time and was out of that courtroom, when Bradley was testifying, when tapes were being played, when you were cross-examining.

He asked for permission at the beginning of the trial to do two things: go to the doctor when he needed to and to leave the courtroom when he wanted to, which I granted. We come to a portion of the case that has absolutely nothing to do with him, nothing. I think maybe one time on one of these tapes that somebody played his name may have been mentioned once. It has nothing to do with him. You didn't make a mini-opening, nothing.

And now we are stopping this portion of the case, which doesn't make sense to me, I mean

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Rec. Doc. No. 1697, p. 9 (Tr. 12/7/00).

it really doesn't. . . . And my feeling is, and there is no question he is sick. I am not questioning his illness. And I read some of the transcripts last night where I was talking to you about him.

I don't know why he doesn't go to the doctor. I don't know why he didn't do it in September. You know, things would have been a lot different.

I have several options. If I could finish this portion of the case, I might just stop everything. I don't think Deumite is going to keep him out ten weeks.

* * *

MR. FANNING: But, Judge, even if that were the case and we would continue on with the trial and my client would continue in his insistence to take the stand, I don't think he would be in condition to -

THE COURT: Well, I don't know what I would do. You know, I have got this much invested in time and everybody else does.

Now, I haven't had time to research it. I don't know if I can hold the same jury. Grant a severance, hold the same jury, let them go all the way and finish one, and then come back and deliberate for another.

MR. FANNING: I don't know.

THE COURT: What I am trying to avoid is having two different juries running two different verdicts or no verdict at all.

But my immediate concern is not what I do with him in the future, but I don't understand why he is objecting now because I can tell you as an officer of the court, he did not stay when Jazz came, which was the most serious, some of the most serious allegations against him, he was out of that courtroom. I was totally shocked.

A couple of times I even thought I was going to ask you whether or not he should be leaving at a time when there was some pretty critical testimony, either because somebody was directing or crossing and his tapes were being played. And he just wasn't in there. Now maybe he was having chest pains, I don't know.

THE COURT: Well, the point though is, it was at the point of the case where he was a charged party, whereas here on the 15th, he is not even a charged party.

MR. FANNING: Well, -

THE COURT: I mean, frankly, you know, it just disturbs me that I have to grant another continuance today. I have got jurors who are well who are ready to go, who -- I have got all the other defendants who are ready to go, and it doesn't pertain to him.

Now, when we get to the part of closing this segment, then it is going to be a different story,

and I might have to grant a severance. I might have to grant a continuance.

I mean that case that I showed you all last night, that person was off for two and a half months, and that judge got affirmed.

Now, whether I would want to hold a jury five weeks until he gets well, if he has the surgery -- nobody is more concerned about his health than I am. I mean I want that -- I am not arguing about that.

* * *

THE COURT: Now, my concern is the overall interests of the other defendants who are here. I mean, if these defendants, and I think they had a legitimate concern, Mr. Cole raised it yesterday about the juror and whether or not, you know, an extra day would help the juror. The juror doesn't need an extra day. She says she is fine now.

* * *

THE COURT: But the reports I am getting from the - you see, there is no reason to delay any more. If he is not going to come back in this trial, it is going to require a severance anyhow.

On the other hand, me delaying and waiting and waiting and losing jurors could cause a mistrial for everybody. So what do I have to lose as a judge in saying I am going to continue today on a portion of the case that has nothing to do with your client?

MR. FANNING: Judge, in response to the -

THE COURT: If I wait today and I wait until Monday, where is that going to bring us? I mean, where is it going to bring us three weeks from now?

You see, it is not going to matter. To me, it is not going to matter whether I -- if I wait today, the only thing that is going to tell us is he decided to have the surgery or they couldn't have the surgery.

And I don't want to put any more pressure on him. I don't think we ought to call him any more. I mean, it doesn't pertain to him. This segment of the case does not pertain to him.[94]

A review of the transcript of the March 23, 2000 conference reveals that the government, for the first time, raised the issue of Johnson's bad faith:

> [W]e feel that Bobby Johnson has acted and is acting in bad faith with this court. Mr. Johnson knew about this medical condition over six months ago, in September.
>
> * * *
>
> For whatever reason, okay, Bobby Johnson decided not to do that. Not only did he decide not to get bypass surgery which was recommended then, he elected not to see a cardiologist until yesterday.

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[94] Rec. Doc. No. 1590, pp. 2-9 (Tr. 3/23/00).

> The Court basically begged him and Mr. Fanning to get him to go see a cardiologist. He has refused. He sat here for two and a half months during this trial, never complaining about chest pains before this week.
>
> * * *
>
> We think it's a little more than convenient, Judge, that after hearing the evidence against him, okay, probably after reading all the press accounts, because none of them were good, I am sure after talking with his lawyers and other lawyers in the case, now, and only now, a couple of days after the Jazz Scheme ends, does he go to the cardiologist and start complaining about chest pains and now he elects to have his surgery which he has needed for six months.
>
> We think it is bad faith. We think that this was intentional on his part, not that he is fabricating his health problems, because he is not, but that he waited for six months, got a preview - not a preview - heard the evidence, okay, now wants a second bite at the apple, and it's a very convenient time for him to say, yes, now I would like to have this surgery. I want another trial. I didn't like the way this one went.[95]

Later, during the same conference, the Court expressed its lack of understanding about Johnson's

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[95] Rec. Doc. No. 1590, pp. 12-14 (Tr. 3/23/00).

refusal to waive his presence[96] and then set forth its concern about the prejudice that a further delay would cause to the United States, the co-defendants, and the jury, particularly since the government was close to resting its case.[97] The Court also noted it could not see how Johnson would be prejudiced if the trial continued:

> **THE COURT:** And, so, I don't see where, if you take all the factors the court said, the interests of your colleagues - lawyers, many of whom, including yourself, who are away from home, defendants who have expended a lot of money and are under a lot of stress, families, government lawyers, witnesses, the Court, the jury, sickness on the jury, down to two, down to three alternates, you know, what would I gain by delaying the trial today and where would you be prejudiced if I didn't delay the trial?
>
> I mean, where is the prejudice other than he and his wife have said, I refuse to waive, after saying they did waive, even at the beginning of the trial, I granted it. Now, two months later, they are revoking the request they had made earlier about them coming and going and him getting treatment.

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[96] *Id.* at 23-24.

[97] *Id.* at 23-25.

I don't know where the prejudice is. And if you could show me where the prejudice would be to you or him, because I never mention when somebody is gone. We don't even do it on the record to the jury. Haven't done it even _ [98]

* * *

THE COURT: I put everything down that we are talking about. I put good faith, bad faith, everything around, but I come back to the same thing. It always led me back to one thing. Where is the prejudice to Mr. Johnson? Where is the prejudice to him if we continue? Where is the prejudice to the other defendants? Where is the prejudice to the government? Where is the prejudice to the administration of justice? And it just jumps out of the window.

MR. FANNING: In response, Judge, let me say a couple of things. The first is that my client, as I said, has shown up every day to go to bat or to appear at trial and has left on days only when his health required it. He has not absented himself from the courtroom at any time for any frivolous reason, any reason other than a medical reason. And his absences have become more frequent

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[98] *Id.* at 26.

lately and that's because his health condition has deteriorated.

THE COURT: But where is the prejudice if we continue with the 15th Riverboat if he is not there? Where is the prejudice that you absolutely need him to ask a question that you are not going to ask?

MR. FANNING: That's what I am coming to, Judge. He has been here throughout and on several occasions -- and his wife has been here throughout with a legal pad, sitting on the front row, and she has far, far more notes on what has happened in this courtroom in matters that have nothing to do with jazz because she was -

THE COURT: But the reporters are telling me they are giving you all transcripts, not giving them, but providing you all with the transcripts.

MR. FANNING: Judge, my point is this -

THE COURT: It is not like he is not going to know.

* * *

THE COURT: But I don't see, with all due respect, I don't see -- I see more prejudice to the other defendants by not going forward than I do to your client

> by not stopping the trial. And I am not going to grant a severance until I know what is going on. So, it is as simple as that.[99]

Thereafter, the Court decided to proceed with the trial for the following reasons:

> **THE COURT:** The Court has discussed this very thoroughly with the parties, and Court has reviewed the law in this area, and the part of the case that we're now dealing with does not involve Mr. Johnson. And when the Court balances the prejudice that would be imposed on the government, the other defendants, the witnesses, the jury, the Court, the witnesses and the overall administration of justice, the Court believes that we should continue with this phase of the case. At the conclusion of this phase of the case, the Court can then revisit the issue. By then we will hopefully know whether or not Mr. Johnson has or has not had surgery and the success of that particular surgery, and then at that time we can decide whether or not the trial will continue, the trial will be delayed, if there will be a severance or any other type of relief that the Court might entail, which could include continuation of the trial without Mr. Johnson being here on the grounds that he has voluntarily waived his presence.
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> As I said in the conference, if by chance Mr. Santini should be asked a question about some other phase of the case that's not

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[99] Id. at 28-30.

related to the Fifteenth Riverboat that might involve Mr. Johnson, if counsel does not believe he can cross examine that witness without Mr. Johnson being present, then the Court will hold that matter open to allow Mr. Fanning to ask Mr. Santini a question or two about whatever he may have testified to about Mr. Johnson before the government rests its case.[100] And obviously the Court would like an update, but, as I said to counsel, I do not want to do anything that interferes with the proper treatment of this gentleman, nor does anybody else for that matter. But we will continue with the trial. We will let your objection, Mr. Fanning, be made general for each day that we have to proceed without him being here, and that will be the ruling of the court.

MR. FANNING: My objection is noted and is continuing for each day, is that correct, Judge.

THE COURT: That's correct, sir. And it's also part of the ruling, that I'm reserving to you the right to move for such other relief as you think may be appropriate as we find out more information about the status of Mr. Johnson.[101]

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[100] The court reserved Johnson's right to cross Agent Santini at the close of the government's case later in the proceedings. *See* Rec. Doc. No. 1562, p. 154 (Tr. 3/23/00).

[101] Rec. Doc. No. 1562, pp. 6-7 (Tr. 3/23/00).

Coronary bypass surgery was performed on Johnson on March 28, 2000. On March 29, 2000, the United States filed a motion seeking to have Johnson tried in absentia.[102] The government rested its case in chief on April 17, 2000.

When the government filed its motion to try Johnson in absentia on March 29, 2000, there was some disagreement between Johnson's two attorneys as to how they wished to proceed if the Court denied a motion for severance or mistrial, even though the only motion pending was a motion for a continuance. Fanning wished to proceed and vigorously represent Johnson. Ernest Johnson, Fanning's co-counsel, believed they should abstain from participating at the trial at the risk of waiving their objection to continuing the trial in Johnson's absence. The Court ruled that the attorneys would be allowed to fully represent Johnson without waiving any rights. The Court also again reserved to Johnson's attorneys the right to cross examine the government's witnesses and to allow Johnson to present his own defense after his co-defendants had completed their defense.

On March 31, 2000, Johnson filed a motion for a mistrial. Johnson based his motion for a mistrial on his inability to be present for the remainder of the case because of his medical condition. To support his motion, Johnson attached the following exhibits: (1) letter of March 28, 2000 from Dr. James Carter; (2) letter of March 23, 2000 from Dr. Joseph Deumite; (3) letter of March 31, 2000 from Dr. Carlton H. Sheely, III; (4) letter of March 30, 2000 from Dr. Stephanie Cave; and (5) affidavit of Kim Johnson, Johnson's wife. The documents do establish: (1) there was a medical need for the surgery; (2) the surgery performed was for the same medical condition for which surgery had been scheduled in September of 1999, some eight months earlier;

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[102] Rec. Doc. No. 1160.

and, (4) the "medical reports" which Johnson was reporting to his attorneys were different from the doctors' reports in several important respects. There is also some conflict between the reports of Dr. Cave and the other doctors. Dr. Carter's report of March 28, 2000 reveals Johnson weighed 218 pounds in September of 1999 and 220 pounds on January 4, 2000. His blood pressure during the same period was 140/86 and 150/70, respectively. Dr. Cave reported that Johnson had lost thirty pounds and was walking two miles per day.[103] However, on September 28, 1999, Dr. Cave's medical records report Johnson's weight at 210 pounds. Johnson's weight on March 22, 2000, six days prior to his surgery was 219.9 pounds, or a net gain of almost ten pounds, as compared to a thirty-pound loss reported by Dr. Cave.[104]

On April 3, 2000, the Court postponed the trial and the presentation of the defense's case until the Court could receive a prognosis of Johnson's medical condition and whether he would be able to return to the trial in person or through alternative means offered by the Court. At a morning conference the Court suggested that because a motion for a mistrial had been filed and because the Court had been told on numerous occasions that Johnson wanted to be tried with Edwin Edwards and the other defendants, the Court was willing to grant a continuance until more information was received from Johnson's doctors. At this point, counsel for the other defendants objected to the delay. Fanning then withdrew Johnson's motion for a continuance because he was concerned his client might have a heart attack. Fanning also advised the Court that, according to the Johnsons, the doctors said that "he [Johnson] would not

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[103] Rec. Doc. No. 1166 (Exh. E).

[104] *Id.*

likely be able to testify in his own behalf for months, for two months."[105] The Court again noted that it wanted additional information from the doctors. A telephone conference was then scheduled by the Court with counsel and Drs. Sheely and Deumite for later that afternoon.

The Court discussed Johnson's then current medical condition and his prognosis with both Dr. Deumite and Dr. Sheely in separate conferences. Both doctors needed more time to answer the questions posed by the Court and counsel, particularly as to when Johnson could testify.[106] However, Dr. Sheely stated:

> I think, it's fairly safe to say that the condition he's in today is certainly far better than it was three weeks ago when he was sitting in court. I would think that in a week's time, he'll feel even a lot better than he does now.[107]

When asked if Johnson could participate in the trial from home, Dr. Sheely stated:

> Of course, he went home yesterday [from the hospital]. That's going to be probably a decision that he himself is going to have to make as to what he feels like is in his best interest. You know, can he physically be brought there, of course, to the trial? I would not think so, you know, any time in the next

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[105] Rec. Doc. No. 1228, p. 33 (Sealed Tr. 4/3/00); Rec. Doc. No. 1593, p. 33 (Redacted Tr. 4/3/00).

[106] Rec. Doc. No. 1571, p. 32 (Sealed Tr. 4/3/00); Rec. Doc. No. 1594, p. 32 (Redacted Tr. 4/3/00).

[107] *Id.* at 28.

> week or so. But if you're asking can he just receive audio visual input from the court, I wouldn't think that would be too much of a stress on him, certainly not physical stress just watching it. I don't know about the emotional stress, but as long as his blood pressure's under control, I don't see any big objection to it.[108]

Dr. Sheely also stated that Johnson should be able to watch his wife testify and be cross-examined if he were properly monitored by a home health nurse.[109]

Dr. Deumite expressed similar opinions about Johnson's then present condition and future prognosis. Dr. Deumite stated he would agree with Dr. Sheely, at this point: "I think that with kind of a week reprieve, I think everyone's going to have a better idea then.[110] In reference to whether Johnson could participate in the trial from his home, Dr. Deumite stated:

> I would be expecting that - I mean, if there is a way that this could be teleconferenced from his home, I don't see any reason that that wouldn't be easy to do. I mean, short of being uncomfortable, which should be progressively improving and dramatically better in a week, he's certainly more able medically and physically to continue in the trial now than he was before his bypass surgery.

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[108] *Id.* at 28-29.

[109] *Id.* at 28-31.

[110] *Id.* at 44.

> I think right now, you know, it's a matter of being uncomfortable and that sort of thing, and that's going to progressively improve, so I think a week's delay is very reasonable, and I would expect at-that time that he could continue at that point with the setup that y'all have arranged.[111]

When asked if Johnson could return to the courtroom within a week, Dr. Deumite stated:

> I mean, I don't know whether he would actually be able to go to the courtroom, but I think if you had him set up on a video conference kind of telephone conference deal that I think that would be very, very reasonable.[112]

Dr. Deumite was asked whether Johnson could watch his wife testify and whether he could testify. Dr. Deumite stated that "medically he's going to be able to tolerate that stress much better now than he would have before certainly."[113]

The Court then conducted another hearing to determine whether to immediately proceed with the case in Johnson's absence. Specifically, the Court wanted to determine whether to delay the commencement of the defendants' case for one week in order to give the doctors an opportunity to examine Johnson and evaluate his condition. The Court also wanted to give Johnson some additional recovery time.

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[111] *Id.* at 44-45.

[112] *Id.* at 45.

[113] *Id.* at 46.

The Court initially suggested that a short delay in the trial would be proper for the following reasons: (1) to allow Johnson an opportunity to recuperate; (2) Johnson's doctors both stated that Johnson could participate from his home without compromising his medical condition and would be better able to withstand the rigors of trial post-surgery; (3) the Court could not be sure at that time whether Johnson's motion for mistrial could be considered a knowing and voluntary action on Johnson's part, because his counsel repeatedly told the Court that Johnson could not discuss the matter in detail without Mr. or Mrs. Johnson getting too upset; and (4) since trial would not be held on Friday to allow a juror to be with his spouse during her surgery, a three day trial delay would give Johnson seven days to recover, enough, in the opinion of his doctors, to participate comfortably and intelligently from home.[114] The government agreed to a one week continuance, while the defendants objected. However, Fanning then withdrew his motion for a continuance and requested a mistrial. Fanning also stated that the alternatives suggested by the Court, such as participating from home via audio, video, telephone, beeper and/or computer were unacceptable to Johnson.

At this point in the hearing, the Court now had six defendants seeking a severance, one defendant seeking a mistrial and withdrawing a motion for a continuance, and the government seeking to try Johnson in absentia.

During the hearing, the remaining defendants, all of whom wanted to have their severance motions granted, sought in the alternative to be allowed to continue taking testimony from witnesses who bore no relation to Johnson or

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[114] Rec. Doc. No. 1565, p. 11 (Tr. 4/3/00).

the Jazz scheme in any way.[115] Even Fanning, who made a general objection, could find no prejudice in allowing the defendants to go forward with unrelated witnesses.[116] Thus, the Court ruled the trial could proceed.[117] The Court, however, granted Johnson the right to recall any of the defense witnesses on cross-examination.[118] One defense witness testified late that afternoon on matters unrelated to the Jazz Scheme.

On April 4, 2000, the Court, on its own motion, reconsidered the ruling it made on the preceding day. The Court ruled that the trial would be postponed until Monday, April 10, 2000.[119] At the request of counsel for Johnson, and without objection from the other parties, the Court instructed the jurors as follows:

> As you know during the time this case has been pending, several people have gotten sick as the case has progressed, whether it's a juror or defendant, what have you. Well, that is the

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[115] *Id.* at 27-55.

[116] *Id.* at 57.

[117] *Id.* at 76-80. The Court also gave Johnson the right to recall any of the defense witnesses on cross examination. *See* Rec. Doc. No. 1566, p.11 (Tr. 4/4/00). Thereafter, one defense witness testified on matters related to the Jazz Scheme.

[118] Rec. Doc. No. 1566, p. 11 (Tr. 4/4/00).

[119] Fanning advised the Court of cross-examination difficulties he claimed already to have experienced due to the absence of Johnson. However, the Court did not believe this to be a problem considering the amount of time counsel had to prepare for the trial and the representations previously made to the Court by Fanning regarding his and Johnson's trial preparations. *Id.* at 7-14.

> problem we had yesterday, and that is the problem we're having today in that Mr. Johnson is ill, and we need to stop until we can resolve the problem surrounding that matter, so we're not going to have any testimony today. And I just ask that all of you be understanding. I mean, various people have gotten sick, including members of the jury, and, you know, if you're sick, you're sick. So I ask your patience in that regard. . . .[120]

In addition to continuing the trial, the Court was also concerned whether Johnson was, in fact, knowingly and intelligently requesting a mistrial.[121] In fact, the Court had expressed a similar concern on April 3, 2000.[122]

Specifically, the Court was concerned whether Johnson might be able to raise a jeopardy claim to bar a subsequent re-trial, unless he expressly consented to a mistrial.[123] Therefore, the Court ordered Johnson to execute and file an affidavit stating that he agreed to a mistrial.

The Court's concern proved to be valid. During a chambers conference later that same day, Johnson's attorneys advised the Court that Johnson was unable to execute the affidavit, as requested by the Court, because of extreme

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[120] *Id.* at 38-39.

[121] Rec. Doc. No. 1566, p. 15 (Tr. 4/4/00).

[122] *See* Rec. Doc. No. 1565, pp. 12-15 (Tr. 4/3/00).

[123] *See* United States v. Jorn, 400 U.S. 470, 91 S. Ct. 547, 27 L.Ed.2d 543 (1971) (cautions against granting a mistrial without the defendant's consent).

emotional distress he was experiencing.[124] In fact, one of Johnson's attorneys advised the Court:

> [I]f I gave you an affidavit right now saying that Bobby Johnson wants us to go forward with this motion and later he came back with a 2255, I couldn't take an oath and say I'm comfortable that he understood the thing when he signed it, because he was really distraught, upset, sobbing uncontrollably, clutching his chest; asking for pain medication, and this was nonperformance for me.[125]

During a conference held on April 4, 2000, the Court learned for the first time that Dr. Sheely had actually scheduled Johnson's surgery for September 24, 1999 and that Johnson had cancelled it without advising the Court of this very important fact. The circumstances under which Dr. Sheely's letter of September 15, 1999 surfaced warrant some discussion. One purpose of the hearing was to assemble the medical evidence requested for the April 6, 2000 hearing. During this discussion, the following colloquy ensued:

> **FANNING:** [T]hat's Sheely's September letter.

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[124] Rec. Doc. No. 1596, pp. 46-49 (Sealed Tr. 4/4/00); Rec. Doc. No. 1597, pp. 46-49 (Redacted Tr. 4/4/00).

[125] Rec. Doc. No. 1596, p. 49 (Sealed Tr. 4/4/00); Rec. Doc. No. 1597, p. 49 (Redacted Tr. 4/4/00).

GREENBERG:[126] Is that in your brief?

FANNING: No.

GREENBERG: Okay, I don't know if I've ever seen that.

COURT: This is September 15th of `99, Dr. Sheely.

FANNING: I gave that to the Court didn't I?[127]

* * *

GREENBERG: If I could throw in my two cents, Judge. I'm much more concerned now than I was in court about getting the records from these doctors, because, again, nothing -- no suggestion of anything untoward by Mr. Fanning, but that letter that says that surgery was schedule[d] for September 24th, 1999, I've never seen that, nor was it ever shown to the Court, because the status conference we had was dated previous to that letter--

COURT: I didn't know it was scheduled.

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[126] Todd Greenburg and Jim Letten are Assistant U.S. Attorneys.

[127] Rec. Doc. No. 1596, pp. 2-3 (Sealed Tr. 4/4/00); Rec. Doc. No. 1597, pp. 2-3 (Redacted Tr. 4/4/00).

GREENBERG: I didn't either until right now, which is very significant.

COURT: I just thought he was told he needed it.

GREENBERG: Exactly. And now I understand from that Dr. Sheely - that it was actually schedule[d] for a specific date, which is very significant-

LETTEN: Your Honor, I can say with confidence none of us have seen that before.

GREENBERG: Now it's of utmost importance to me to get the records.[128]

On April 6, 2000, the Court held a very long hearing on the government's motion for trial in absentia and Johnson's motion for mistrial. The Court permitted both evidence and argument during this hearing.[129] Johnson's attorney expressed concerns as to whether Johnson was legally competent to aid in his defense based on recent interactions with his client. Part of the problem related to Johnson's disagreement over a name his attorney called him earlier in the trial. During the hearing, the Court outlined for the record information relating to the extreme length and complexity of the case to date. The Court stated:

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[128] Rec. Doc. No. 1596, p. 9 (Sealed Tr. 4/4/00); Rec. Doc. No. 1597, p.9 (Redacted Tr. 4/4/00).

[129] *See* Rec. Doc. No. 1561 (Tr. 4/6/00).

I'm not going to cut her off on anything -- you know, it's a lay opinion. I'm going to let her put everything she wants in the record, because I think it's the appropriate thing to do, but we have to have -- I mean, I've got to have a procedural vehicle here to do something. How do I grant a mistrial today? And do I just continue to stall this case and stall this case? I mean, what do I do?

Why don't you have a seat a minute. Let me just put in the record some things that I looked up before I came into court, and I thank the staff of the Middle District and my own staff for doing this.

This case began on January the 10th. Prior to that, we sent out -- just goes to show you the amount of work that's been entailed in this case so far. We sent out five hundred and one questionnaires to the jury. That was the first questionnaire. We got all those questionnaires back in, and they had to be reviewed, and based on that review some people were excused.

We sent out the long questionnaire to three hundred thirty-two prospective jurors who had to complete it and send it back in under some very strict deadlines. All of those had to be reviewed by the court.

We had a hundred and twenty-five jurors show up on January the 10th. We had another one hundred twenty-five jurors on standby, meaning they could have been called

on short notice if we needed them. On January 10th, a hundred and twenty-four jurors showed up; on January 11th, a hundred and twenty; on January 12th, seventy-two; on January the 18th, forty-one; on January the 19th, thirty-two; on January the 20th, nineteen; on January the 21st, sixty-five; on January 23rd, fifty.

Now, because we had these people on standby, we didn't know if we needed them or not, some of these people had to go to work, so on January 12th while seventy-two reported, eighty were paid. On January 19th while thirty-two reported, fifty-nine were paid. On January the 20th, fifty-nine were paid although nineteen showed up, and the rest are equal.

The number of days that we took off that were work days during jury selection were three, and everybody knows the reason for part of that. The number of actual days it took to select the jury was eight. The approximate number of pages, and this is approximate, of transcript for the voir dire is approximately two thousand pages of transcript to pick the jury.

The docket sheet is now one hundred and seventy-seven pages long as of 8:23 this morning. We've had one thousand one hundred and ninety-seven separate documents filed in the record. That's not evidence, that's one thousand one hundred ninety-seven documents filed in the record.

Two hundred ten motions were filed and ruled on prior to trial. Forty-six motions. have been filed during the trial. Two hundred and fifty-six total motions have been filed, and that could vary because, for example, the government's motion in absentia is really taken as an oral motion in response to the mistrial, so it may not be counted as a motion.

We began taking testimony on January the 26th. The number of days we've been before the jury either a whole day or a part of the day is approximately fifty-two days. The number of days we have taken testimony when the jury was [not] present since the trial has begun is forty-three days. The number of witnesses who have testified thus far that we have is seventy-five. The number of exhibits that have been admitted into evidence, these are evidence before the jury, is nine hundred exhibits, approximately nine hundred exhibits. There are another nine documents which have been tendered for admission but not yet admitted.

There are approximately nine thousand pages of transcript in pretrial proceedings. There are approximately, excluding the voir dire, ten thousand pages of transcript for the trial. The number of pages of transcript since the indictment has been returned for all of these is approximately twenty-one thousand pages of transcript.

> The number of days that I have been in court, in a conference or in trial in this case, eighteen days in trial in January, eighteen days in trial in February, sixteen days in trial in March, approximately fifty-two total days in trial, another forty-three days in pretrial and post-trial conferences and hearings.
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> Now, that's an evaluation of the record, so when you have this much involved in a case, then the concern the court has is - the court doesn't want to do anything at all that would disrupt all the presentation of this trial that would affect any other party's right, whether it's the United States or the defendant or the jury or me or the witnesses or what have you. So all of these are factors that the court has to take into consideration, and that's why it's so important that the correct procedural device be before the court.[130]

During the hearing, the only witness to testify was Kim Johnson. The government did not call any witnesses, but did introduce a number of exhibits, including medical records from the various doctors who treated Johnson, including those that have been referred to above.

One of the key documents introduced by the United States was Dr. Cave's medical records. As noted earlier, these records clearly establish that Johnson was not having any medical problems until two days after the government had

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[130] Rec. Doc. No. 1561, pp. 12-15 (Tr. 4/6/00).

completed its evidence against Johnson relating to the Jazz Scheme. The testimony of Kim Johnson also verified that Johnson developed symptoms of heart trouble during the Summer of 1999 and that, after being examined by a cardiologist and a cardiovascular surgeon, Johnson was scheduled for heart bypass surgery on September 24, 1999. Johnson cancelled this surgery and decided to undergo chelation therapy after he and his wife did some research on chelation treatment. According to Mrs. Johnson, Johnson wanted to go to trial with Edwin Edwards because of Edwin Edwards' popularity. Johnson also wanted to testify in his defense. Mrs. Johnson also testified that Johnson did not use his medical condition to terminate the trial, but did change his mind on a daily basis regarding whether he wanted a mistrial.[131] On cross examination, Mrs. Johnson admitted that Johnson was not treated by a cardiologist between his September 9, 1999 appointment with Dr. Sheely and his March 22, 2000 examination by Dr. Deumite. She also disagreed with Drs. Deumite and Sheely's opinion that Johnson could begin participating in the trial through teleconferencing, audio and other means within days. Finally, she admitted that Johnson understood the nature of the criminal proceedings after the surgery and had been talking to his attorneys.[132]

The Court denied Johnson's motion for a mistrial, without prejudice, after hearing all of the evidence because the Court concluded that the record was not clear that Johnson actually wanted a mistrial.[133]

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[131] Rec. Doc. No. 1561, pp. 37-84 (Tr. 4/6/00).

[132] *Id.* at 88-113.

[133] *Id.* at 117-128.

The Court also ruled that Johnson could file another motion for a mistrial if he signed a proper affidavit indicating that he did want the Court to grant a mistrial:

> [T]here's no way anybody' s going to be able to try him again if I grant this. He's got a clean jeopardy motion. He's got an incompetent counsel motion, you know, if I grant this . . . .
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> * * *
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> [W]hy don't you just get me a judgment of acquittal and let me sign it, I mean, because that's what's going to be the effect of it .[134]

Although Johnson's attorney did object to the Court's denial of Johnson's motion for a mistrial, counsel advised the Court that he had spoken to Dr. Sheely, who stated that he (Dr. Sheely) "didn't know what his findings were going to be but that it may be that Mr. Johnson could come to court for an hour or two starting Monday."[135]

The record in this case then reflects the total frustration and suspicions the Court had at this point regarding Johnson's ever changing positions on his request for a continuance or a mistrial. The Court noted:

> I mean, every time I get ready to do something - I want to do a continuance, you withdraw it. I get ready to do a mistrial, we don't know if

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[134] *Id.* at 118-19, 122; *see also* id. at 194.

[135] *Id.* at 138. This is the last report the Court received from Dr. Sheely until he testified during a post-trial hearing on Johnson's motion for a new trial.

> we want it. You know, now I'm ready to rule on the government's motion in absentia. Well, he may be incompetent. I mean, where are we headed? I mean, sooner or later somebody's got to take a stand and say this is what we want. It's a moving position here. As soon as I get ready to grant something or rule on something, it's taken away. The motion for continuance is taken away. Now y'all raise the competency issue.
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> * * *
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> But the point is, y'all have complicated this thing so much now intentionally or otherwise from the standpoint of whatever [your] trial strategy is that I have to just start cleaning it up now . . . .[136]

The Court then set forth a substantial number of accommodations which would "be available [to Johnson] whether or not the Court grants or denies the government's motion for trial in absentia."[137] These accommodations, which were also set forth in a written minute entry dated April 6, 2000,[138] included the following: (1) providing Johnson with a more comfortable chair; (2) having a nurse present at all times to monitor Johnson's blood pressure and check on his overall health; (3) adjusting the time that the trial would be held, including instituting longer and more frequent breaks; (4) allowing Johnson to participate in and/or

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[136] *Id.* at 123-24, 135.

[137] *Id.* at 195.

[138] Rec. Doc. No. 1231.

monitor the trial from home via audio/visual feeds; (5) providing Johnson and his counsel with real-time transcription of the trial proceedings; (6) permitting counsel to take as many recesses as was necessary to confer with Johnson; (7) permitting counsel to have beepers, cellular telephones, and/or computer e-mail systems in the courtroom, which could be used to communicate with Johnson if Johnson decided to participate from his home; (8) appointing an additional attorney to stay home with Johnson to assist and advise him while his trial counsel remained in the courtroom; (9) using the Court's discretion under Fed. R. Evid. 611 to allow Johnson to present his defense, if any, after the other defendants had completed their case; and (10) allowing Johnson to testify as the last witness in the trial, if he so desired.[139] The Court was not only trying to give Johnson sufficient time to recover and remain in the trial, but also to give him ample opportunity to present his defense and to testify if he wanted to do so.[140] The Court further advised the parties that it would be willing to consider any additional accommodations that Johnson or his counsel suggested, including a brief continuance if necessary. The Court emphasized that any or all of the accommodations suggested by the Court or the parties would be provided **at the Court's expense.** The Court took the matter under advisement.

On April 9, 2000, the Court, in a written order, granted the government's motion to try Johnson in absentia.[141]

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[139] Rec. Doc. No. 1561, pp. 195-99 (Tr. 4/6/00).

[140] If Johnson did decide to testify or to return to court, the Court emphasized that it would reduce the trial time to that which Johnson could easily handle because of his weakness from the surgery.

[141] Rec. Doc. No. 1207.

Trial proceedings were to begin again on April 10, 2000. However, Johnson's attorneys filed an affidavit with the Court before the proceedings could begin which stated that the attorneys could not present a defense because Johnson was not present. In addition Johnson's attorneys filed an affidavit, signed by Johnson, in which he requested a mistrial.

The Court again set forth in the record of April 10, 2000, that any or all of the accommodations previously offered to Johnson were still available upon request. The Court also stated that, at the close of the defendants' case, it would grant Johnson a continuance if he wanted to present a defense. Before beginning any further proceedings, the Court recessed to give Johnson's attorneys an opportunity to confer with their client and his wife, and advise them of the Court's ruling and all of the options which the Court was making available. At the conclusion of the recess, Johnson's attorneys advised the Court that Johnson did not wish to participate in or monitor the proceedings through any of the means offered by the Court. In short, Johnson refused to participate in any manner and no longer desired any continuance or any other accommodations which would have allowed him to participate. It is important to note that, at this point, the case which had begun on January 10 was now about to enter its fourth month, the government had rested its case and the defendants were about to present a defense which was not anticipated to last very long. Rule 29 motions for judgments of acquittal had been filed and denied by the Court.[142] In addition, the final jury charge and verdict forms

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[142] *See* Rec. Doc. No. 1224 (March *30, 2000).* A second motion was filed and denied on April 14, 2000. Rec. Doc. No. 1292. The motion for a judgment of acquittal filed on April 17, 2000 was taken under advisement by the Court. pending the jury's verdict. Rec. Doc. No. 1306.

were substantially complete, the number of jurors was down to fourteen, and illness and other juror problems continued to be a problem for the Court. Considering the strong desire of Johnson to go to trial with Edwin Edwards, which had been continually expressed to the Court during the proceedings, the Court was then, and continues to be, suspicious of Johnson's motives in continuing to ask and withdraw requests for continuances, to ask, withdraw, and again ask for a mistrial, and to totally reject all of the many accommodations which had been offered to him by the court.[143]

The defense took only four days to complete its defense and rested on April 14, 2000. Edwin Edwards was the only defendant who testified during the presentation of the joint defense. Johnson decided not to present any defense despite being given opportunity to do so by the Court. During a colloquy with Johnson's attorneys, the Court again emphasized that it would allow Johnson to testify for short periods of time and would also allow him all of the recesses he may need during his testimony. Counsel for Johnson again declined to present any evidence or to call Johnson as a witness.

On April 17, 2000, the government presented its rebuttal case, which was completed in less than one day. The government began its closing arguments on April 18, 2000. However, prior to allowing the government to present its closing argument on the Jazz Scheme, the Court scheduled another telephone conference with Dr. Deumite. The purpose of this conference was to allow the Court to obtain a progress report on Johnson. Again, the Court was taking steps which would have permitted Johnson to at least see

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[143] As noted earlier, the jurisprudence has sanctioned many of the accommodations which the Court offered to Johnson.

and/or listen to the government's closing arguments on the Jazz Scheme at his home if he chose not to return to court. Dr. Deumite testified:

> I last saw him-I think that it was about ten days ago. And he was on course. At that time he was about ten days after his surgery. And I think that he was on course at that time.
>
> The primary problem he was having then was the usual thing that most people have at that time. You know, he was just becoming fatigued very easily, having some trouble concentrating, that sort of stuff, but at that time he was on course. I have not seen him in ten days so I would have expected that he would have improved substantially by then.[144]

Dr. Deumite also testified that Johnson was three weeks past surgery which is the time when his patients "are usually starting to get up and about" and begin cardiac rehabilitation exercise.[145] When responding to questions posed by the Court, Dr. Deumite stated that:

> [A]s far as the issues of coming to court, I have asked since then several patients at what point after their surgery did they feel like they could really legitimately get up and about and you know be able to pay attention for a

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[144] Rec. Doc. No. 1602, p. 2 (Tr. 4/18/00).

[145] *Id.* at 3.

> persistent period of time. And the consensus seems to be about three weeks.[146]

In response to questions posed by Johnson's attorneys as to when Johnson would have been able to begin assisting counsel in preparing his defense, Dr. Deumite testified as follows:

> **DR. DEUMITE:** [T]hat is a little subjective. But I think that he can - I am talking about the usual person can participate in short periods of time, you know, pretty early afterwards. Now, I think that there are periods of lapsing concentration becoming very fatigued and that sort of thing up to about three weeks. Beyond three weeks I think that improves to where you could not that more persistently.
>
> * * *
>
> **THE COURT:** But, Dr. Deumite, let me just ask you a couple of questions because I had offered to allow him even as of yesterday [April 17th] to come back to court and testify and say work an hour, half an hour at a time and let him take whatever recess he needed and whether it was a half a day or whatever and then come back and testify some more and what have you.
>
> Do you think that a process such as that would have been such that he could have participated under those conditions?

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146 *Id.* at 6.

> **DR. DEUMITE:** Well, I think we are at three weeks out, so I think that, you know, my response I guess, is that, you know, somebody could start participating in cardiac rehab which is a little bit more intense at this point, then this is the general - and everyone is different, but this is the general point at which, I think, someone is probably turning for the better. And we are at this point right now I think.[147]

As the record reflects, Johnson neither appeared in person at the trial nor chose to listen or watch the closing arguments from his home. It is important to note also that after Johnson's surgery and possibly even before the surgery, Johnson and his wife were very upset at a remark Fanning had used to describe Johnson earlier in these proceedings.[148] This friction between the Johnsons and his attorney did cause some of the depression which Johnson apparently experienced post-trial. It is obvious that his concern over the trial could have also contributed to some of his depression. One of the crucial issues before the Court is whether Johnson could and should have had his surgery prior to the trial and whether his failure to do so was a trial strategy and thus constitutes a knowing and voluntary waiver of his right to be present. The Court must also consider whether Johnson's decision not to return or accept accommodations offered by the Court was also trial strategy.

After this conference with Dr. Deumite was completed, the government completed its closing arguments. On April 19, 2000, all defendants, including Johnson,

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147 *Id.* at 10-11.

148 Johnson was particularly upset over the use of the word "buffoon."

completed their closing arguments. The case was submitted to the jury on April 20, 2000. The jury returned its verdict on May 9, 2000. Johnson did not appear for the jury verdict nor did he request to be allowed to see or hear the verdict from his home.

Following the verdict, the defendants, including Johnson, filed post-trial motions for a judgment of acquittal and in the alternative, a motion for a new trial. Included in Johnson's motion for a new trial was his claim that the Court erred in granting the government's motion to try Johnson in absentia. Although the Court substantially limited oral argument on the post-trial motions, the Court believed it would be proper to conduct another hearing on the absentia issue. At an evidentiary hearing held on December 7, 2000, the Court advised counsel that it desired to hear the testimony of Dr. Deumite and Dr. Sheely.[149] The Court was particularly interested in hearing whether the surgery performed on March 28, 2000 was the same surgery which Dr. Sheely had scheduled for September 24, 1999. The Court also wanted to learn the difference, if any, in Johnson's medical condition in September of 1999 and March of 2000.

The testimony presented by Drs. Sheely and Deumite clearly establishes that there was no change in Johnson's medical condition from September, 1999 to March, 2000. The testimony also revealed that the surgery performed on March 28, 2000 was the same surgery that Dr. Sheely was going to perform in September of 1999. The Court accepted the testimony of these doctors as experts in their respective

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[149] The Court took it upon itself to call these doctors and ask them to appear on such short notice.

specialties.[150] The Court also noted its utmost belief in the credibility and professional ability of these two doctors.

The doctors testified and the Court agrees that the surgery was medically necessary, both in September of 1999 and in March of 2000. Dr. Deumite indicated that he examined Johnson on March 22, 2000 and ordered a heart catheterization to be performed.[151] The heart catheterization revealed that Johnson "had severe blockage involving all three of the major heart arteries."[152] Johnson was then evaluated for coronary bypass surgery by Dr. Sheely, who scheduled the surgery for March 28, 2000. According to Dr. Deumite, the need for bypass surgery was clear from the catheterization study. Although Johnson reported that Dr. Deumite was concerned about Johnson's diabetic condition, Dr. Deumite testified that he was "not aware" that Johnson was diabetic.[153] Dr. Deumite also stated that, as of September, 1999, Johnson suffered from cardiovascular disease.[154] He noted that he reviewed Dr. Cefalu's report of September, 1999 and stated that the conditions he found in March, 2000 "were the same" as those found by Dr. Cefalu in September, 1999.[155] Dr. Deumite also noted that the stress of the trial could have aggravated Johnson's condition.

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[150] The Court accepted Dr. Deumite as an expert in the field of cardiology and Dr. Sheely as an expert in cardiovascular surgery.

[151] Rec. Doc. No. 1697, p. 6. (Tr. 12/7/00).

[152] *Id.*

[153] *Id.* at 9.

[154] *Id.* at 10.

[155] *Id.* at 12.

On cross-examination by the government, Dr. Deumite noted there was "no substantial difference" between the angiograms performed in September of 1999 and March of 2000,[156] Johnson did not have a heart attack, according to Dr. Deumite.[157] Dr. Deumite then testified as follows:

> **UNITED STATES:** Had you examined Bobby Johnson in September and reviewed those angiograms in September that were taken in September, would you have made the same recommendation to him regarding the surgery and the timing of the surgery that you did make to him in March?
>
> **DR. DEUMITE:** Yes.[158]

The government then asked Dr. Deumite a series of questions about Johnson's post-surgery recovery. He noted that it "would have been safer" for Johnson after his surgery to stand trial,[159] but he could not "say that he is actually better able to stand trial once that has occurred."[160] Dr. Deumite reaffirmed his earlier testimony that the ordinary patient having the same surgery could have returned to the courtroom in three to four weeks.[161] However, he noted that

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[156] *Id.* at 15

[157] *Id.* at 15-16.

[158] *Id.* at 16.

[159] *Id.* at 16-17.

[160] *Id.* at 17. Dr. Deumite also noted it "was probably safer" for Johnson to sit in the courtroom after his surgery than the two months prior to his surgery. *Id.*

[161] *Id.* at 17-18.

some people are different and could take longer to recover. Johnson had problems with depression after his surgery which "delayed his overall recovery" but did not necessarily delay recovery of his physical condition as to "whether he can get up and walk and that sort of thing"[162] Dr. Deumite noted that he did not believe Johnson was malingering during his post-surgery treatment.[163] The effects of the trial, the evidence which Johnson had already heard, and the fact that he was to face a verdict could have caused Johnson's depression.[164] Considering all of Johnson's medical conditions after the surgery, it may have taken Johnson more than three to four weeks to recover, according to Dr. Deumite.

Dr. Sheely testified that he saw Johnson in both September of 1999 and March of 2000. Dr. Sheely noted that it was not until March of 2000 that he found a carotid stenosis, but noted that he had not completed the pre-operative evaluation in September of 1999 that would have been necessary to find the same condition.[165] However, Dr. Sheely noted that, had he conducted his pre-operative screening in September of 1999, the carotid problem "most certainly would have been there. It doesn't develop that fast."[166] Thus, the condition of Bobby Johnson in September of 1999 and March of 2000 "would have been the same."[167]

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[162] *Id.* at 19.

[163] *Id.* at 21.

[164] *Id.* at 22-23.

[165] *Id.* at 93.

[166] *Id.* at 103.

[167] *Id.* at 104.

Dr. Sheely also noted that Johnson was not malingering either in September of 1999 or in March of 2000.

In September of 1999, Johnson needed surgery and was advised of that fact. Dr. Sheely stated he would have operated on Johnson in September of 1999 had Johnson permitted him to do so. In fact, Dr. Sheely noted he sent a letter dated September 15, 1999 to Johnson advising him that surgery had been set for September 24, 1999.[168] Johnson then cancelled the surgery.

If Johnson had elected to have his surgery in September of 1999 as Dr. Sheely had recommended, Dr. Sheely testified that knowing everything he now knows about Johnson's recovery, he would have been ready to go to trial "certainly within two months."[169]

Dr. Sheely noted that the surgery performed on March 28, 2000 was medically necessary. According to Dr. Sheely, Johnson could have resumed courtroom participation either at home or in the courthouse "probably maybe a month afterwards."[170]

IV. Conclusion

Looking at the totality of the circumstances, the Court finds that Johnson knowingly and voluntarily and intelligently waived his right to attend the trial. The Court specifically finds that Johnson made a deliberate and informed tactical trial decision to delay the surgery he obviously needed in September of 1999 in order to go to trial

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[168] *Id.* at 95-96.

[169] *Id.* at 98.

[170] *Id.* at 107.

with Edwin Edwards and the other co-defendants. It is clear that Johnson believed it was a tactical advantage to him to go to trial with Edwin Edwards. The Court is also concerned that neither Johnson nor his attorneys advised the Court that Dr. Sheely had actually scheduled the surgery for September 24, 1999 and that Johnson subsequently cancelled it.

It is clear that Johnson's medical condition in March of 2000 was not materially different from that found in September of 1999. The surgery performed in March of 2000 was the same surgery that was to be performed in September of 1999. It is clear that had Johnson elected to have his surgery in September of 1999, he could have been well enough to proceed with the trial on the scheduled date. If necessary, the Court could have granted a short delay before the trial began. This was a complex, lengthy, multi-defendant case. The record and this opinion set forth the full description of the complexity of the trial and the burdens which would have been placed on the Court, the defendants, the witnesses, the jurors, and the public. This is particularly so considering the timing of Johnson's decision to see a cardiologist and to have his surgery. The Court has expressed its concern elsewhere in this opinion about the timing of Johnson's decision to seek treatment, after the government had completed its case against him and other co-defendants in the Jazz Scheme. The Court was also concerned about the changing positions Johnson took in seeking, and then withdrawing, his request for a continuance or a mistrial. It is also clear that Johnson failed, or refused, to accept any of the accommodations offered by the Court before and after his surgery. Furthermore, despite being given the opportunity to do so, Johnson refused the Court's offer to present evidence at the close of the defendants' case and to seek additional leave time to testify, even if it meant the trial day would be shortened.

In short, the Court concludes the public interest in having the trial proceed clearly outweighed Johnson's right to be present. Johnson, by his own voluntary actions, knowingly and voluntarily waived his right to be present for the trial.

For reasons fully set forth above, the Court again finds that the government's motion to try Bobby Johnson in absentia was properly granted by the Court as a matter of fact and law.

Therefore:

The motion of Bobby Johnson for a judgment of acquittal, or a new trial, based on his being tried in absentia is hereby denied. Baton Rouge, Louisiana, January 5, 2001.

s/

FRANK J. POLOZOLA, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA **CRIMINAL ACTION**

VERSUS

EDWIN EDWARDS, ET AL. **No. 98-165-B-M2**

AMENDED RULING ON DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL

This matter is before the Court on defendants'[1] motions for judgment of acquittal which were filed at the conclusion of all of the evidence[2] and again after the jury's verdict as part of the defendants' motion for a new trial.[3] The defendants have also filed a motion and amended motion for a new trial.[4]

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[1] The defendants Gregory Tarver and Ecotry Fuller also filed a motion for judgment of acquittal at the close of all of the evidence. Since both defendants were acquitted, their motions are now moot.

[2] Defendants' oral motion for judgment of acquittal, made in open court on April 17, 2000. Rec. Doc. No. 1467, 1470.

[3] Defendants' motion for judgment of acquittal or new trial. Rec. Doc. No. 1306.

[4] *Id.*

For oral and written previously assigned and for additional written reasons which will be assigned at a later date, defendants' motions for a judgment of acquittal and defendants' motion and amended motion for a new trial are hereby denied.

The Court will issue a separate order on the amount of forfeiture prior to sentencing.

It is so ordered.

Baton Rouge, Louisiana, November 7, 2000.

S/
Frank J. Polozola, Chief Judge
Middle District of Louisiana

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA **CRIMINAL ACTION**

VERSUS

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[2] Defendants' oral motion for judgment of acquittal, made in open court on April 17, 2000. Rec. Doc. No. 1306.

[3] Defendants' motion for judgment of acquittal or new trial. Rec. Doc. No. 1306.

[4] *Id.*

date, defendants' motions for a judgment of acquittal and defendants' motion and amended motion for a new trial are hereby denied.

Court will issue a separate order on the amount of forfeiture prior to sentencing.

It is so ordered.

Baton Rouge, Louisiana, November 6, 2000.

S/
Frank J. Polozola, Chief Judge
Middle District of Louisiana

United States of America v. Edwin Edwards, et al., No. Crim.A. 98-165-B-M2.

United States District Court, M.D. Louisiana, July 27, 2000

POLOZOLA, Chief Judge.

The United States of America[1] filed a Motion for an Anonymous Jury in this case.[2] The defendants opposed the motion.[3] On January 7, 2000, the Court granted the government's motion.[4] The Court now assigns its reasons for granting the government's motion.

BACKGROUND

The grand jury for the Middle District of Louisiana returned a 34-count indictment and later a superseding indictment against Edwin W. Edwards, Stephen Edwards, Cecil Brown, Andrew Martin, Bobby Johnson, Gregory Tarver, and Ecotry Fuller. This indictment charged, among other things, violations of Racketeer Influenced Corrupt Organization Act ("RICO"),[5] RICO conspiracy, mail and wire fraud, illegal wiretapping, money laundering and extortion. Because of the high media interest in this case, the Court issued a "gag order" on November 9, 1998[6] and

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1 The United States of America will hereinafter sometimes be referred to as "the government" and "the United States."

2 Rec.Doc. No. 278.

3 Rec.Doc. No. 296.

4 Rec.Doc. No. 887.

5 18 U.S.C. § 1961.

6 Rec.Doc. No. 3.

February 9, 2000[7] in an attempt to control prejudicial statements made by the parties in this case and to ensure the parties would receive a fair trial with an impartial jury. The Court also issued a credentialing order for members of the media and another order allowing the press to have a place to conduct interviews outside of the federal courthouse.[8] To further ensure a fair and impartial jury which would not be subject to improper and prejudicial contact, influence, or harassment from the parties, the press and others, the Court granted the government's motion for an anonymous jury to the extent the Court withheld the names, addresses[9] and places of employment of the jurors from the parties, the media and the public. The Court now assigns reasons to support its decision.

CONTENTIONS

The government requested an anonymous jury for the following reasons: (1) "Edwin Edwards is alleged to have been the central figure of an enterprise which corrupted a major industry in the State of Louisiana;"[10] (2) Edwin Edwards accomplished the alleged illegal acts "in large measure through the power of his elected office as governor;"[11] (3) Edwin Edwards and Stephen Edwards are

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7 Rec.Doc. No. 1010.

8 Rec.Doc. Nos. 47 (Credentialing Order) and 292 (Media Bullpen Order).

9 As will be noted later, while the Court did not give the specific street address, the Court did provide the parties with the juror's zip code and parish of residence.

10 Rec.Doc. No. 278.

11 Rec.Doc. No. 278.

charged with interfering with the lawful judicial process, specifically conspiring to obtain illegal wiretaps of the homes of FBI agents who were investigating their criminal activity; (4) Edwin Edwards is charged with interfering with the lawful judicial process, specifically attempting to bribe Judge Alfred Foster Sanders, III and offering to terminate a pending investigation being conducted by the United States Attorney for the Middle District of Louisiana;[12] (5) all defendants potentially face lengthy prison sentences; and (6) the potential for publicity and/or harassment of jurors due to the high level of media scrutiny.[13]

The defendants have filed an opposition to the motion for anonymous jury based on the following reasons:[14] (1)

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[12] These acts are alleged in the indictment filed in *United States v. James Brown, Alfred Foster Sanders, III, Edwin Washington Edwards, Robert Andre Bourgeois, David Judd Disiere, and Ronald R. Weems*, Cr-99-151 (M.D.La.). Alfred Foster Sanders, III and Robert Andre Bourgeois have entered guilty pleas in that case.

[13] The government submitted the following affidavits in support of the motion for anonymous jury: (1) FBI Agent Dennis Horner; (2) FBI Agent Dennis Swikert; (3) Josephine Beninati, Financial Analyst with the FBI; (4) FBI Agent Theresa Hultz; (5) Supervising FBI Agent Geoffrey Santini; and (6) Sid Moreland. The government also submitted the following exhibits: (1) the factual basis underlying Dempsey White's plea agreement; (2) an article which appeared in the Baton Rouge Advocate on July 2, 1999; (3) a transcript from a wiretap of a conversation between Constance A. Koury and Edwin Edwards; (4) an AP wire article dated January 17, 1986; (5) the indictment filed in *United States v. James Brown, et al;* and (6) the superseding bill of information and factual basis related to Judge Foster Sanders, who pled guilty in *United States v. James Brown, et al.*

[14] The defendants submitted the following affidavits in opposition to the motion for anonymous jury: (1) Camille Gravel; (2) Evelyn Gravel; (3) Debbie Baer (two affidavits); (4) Mike Baer; (5) Ann Davenport; (6) Victor Bussie; (7) Fran Bussie; Susan McDuff Fontenot; (8) Edwin Edwards; and (9) Patrick Fanning. Defendants also submitted an excerpt

there is no evidence of any of the defendants being tied to "organized crime" in the traditional sense; (2) there is no evidence of physical harm present; (3) the defendants have not interfered with the judicial process; (4) the defendants would suffer prejudice if an anonymous jury is empaneled; and (5) there is a strong potential to adversely affect the exercise of their peremptory and cause challenges during voir dire. Defendants rely heavily on the factors enunciated in *United States v. Krout*[15] to support their arguments.

Oral argument was held on the motion on September 14, 16 and 17, 1999. The Court granted the motion and noted it would assign written reasons at a later date. These reasons now follow.

LEGAL STANDARDS

The issue of whether a court may use an anonymous jury in the trial of a defendant charged with a criminal offense is not a matter of first impression. The Fifth Circuit as well as other circuits have approved the use of an anonymous jury under certain circumstances. A review of the jurisprudence from the Fifth Circuit and the facts of this case support the Court's decision to use a partially anonymous jury herein. While the Court did grant the government's motion to use an anonymous jury in this case, the use of the term "anonymous" is very misleading. It is true the Court did not give the parties, the media or the public the names, addresses or places of employment of the jurors. However, the Court did provide all concerned with a

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from a conference in the chambers of Judge Vance in the matter of *United States v. Cleveland* on June 19, 1997, and statements made by Patrick Fanning in open court on September 17, 1999.

15 66 F.3d 1420 (5th Cir. 1995).

voluminous amount of information about each juror. The Court used a 28-page questionnaire which was answered by each potential juror and consisted of 116 questions, some with numerous sub-parts.[16] In addition, the Court conducted an extensive voir dire of the potential jurors comprising approximately 2,000 pages of transcript. The parties were permitted to suggest questions and follow up questions to be asked of each juror. All of the parties had an exhaustive amount of knowledge about each juror which allowed each of them to make an informed decision on which jurors should be accepted, challenged for cause, or peremptorily challenged. The Court now turns to a discussion of the jurisprudence from the Fifth Circuit on this issue.

The Fifth Circuit Court of Appeals first addressed the issue of whether it was proper to have an anonymous jury in *United States v. Krout*.[17] In *Krout*, as in this case, the names, addresses, and places of employment of the jurors were withheld. Relying on jurisprudence from the Second Circuit, the Fifth Circuit set forth several factors that may justify anonymity of a jury: (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that

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16 A copy of the questionnaire used is attached as Appendix A to this opinion. The parties stipulated to the questions set forth in this questionnaire.

17 66 F.3d at 1420.

jurors' names would become public and expose them to intimidation and harassment.[18]

In *Krout*, the Fifth Circuit affirmed the trial court's decision to empanel an anonymous jury. The appellate court found that the district court's decision was supported by the evidence adduced at the trial and by the wiretap affidavits presented by the government. Additionally, the Fifth Circuit found that the "Texas Mexican Mafia" was in inherently dangerous organization. Since *Krout* was decided, a number of Fifth Circuit decisions have upheld use of anonymous juries under a variety of circumstances. A careful review of those cases is in order.

In *United States v. Riggio*,[19] the defendant was indicted for conspiracy to commit arson and use of fire to commit a federal felony. Concerned about possible jury tampering, the trial court assigned numbers to the jurors to assure anonymity. The trial court based its decision to use an anonymous jury on the following factors: (1) the record reflected that witnesses were allegedly threatened;[20] (2) the defendant had been accused of jury tampering in a previous case; and (3) there were alleged ties of the defendant to organized crime. In affirming the district court, the Fifth Circuit stated the following with respect to the propriety of empaneling an anonymous jury:

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18 *Krout* 66 F.3d at 1427 (citations omitted).

19 70 F.3d 336 (5th Cir.1995).

20 "The record reflects that witness A was told he would be a 'dead mother' if he cooperated, witness B was told Riggio would 'blow his brains out,' and witness C was told that the witnesses would become a part of 'history . . . real quick.'" 70 F.3d at 338.

> In determining whether jurors need protection, the district court should consider the defendant's involvement in organized crime, his *past attempts at interfering with judicial proceedings*, his previous history of violence, the *extent of press coverage*, and the *likelihood of juror harassment or intimidation*.[21]

The Fifth Circuit also noted that Riggio had "committed fraud in order to serve on another jury, demonstrating a lack of respect for the judicial process and suggesting that he was capable of and willing to interfere with the jury system."[22] The Court also noted that "[t]he district court had a reasonable basis to conclude that similar threats and attempts at intimidation were likely to be made to the jurors if their identities were known."[23]

In *United States v. Branch*,[24] a trial involving the Branch Davidians, the district court sua sponte ordered the use of an anonymous jury. The Fifth Circuit upheld the trial court's decision. However, in doing so, the Fifth Circuit stated that referring to the jury as "anonymous" was misleading for the following reasons:

> Anonymity has long been an important element of our jury system. Jurors are

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21 *Riggio*, 70 F.3d at 339-340 (emphasis added) (citing *United States v. Paccione*, 949 F.2d 1183 (2nd Cir.1991)).

22 *Riggio*, 70 F.3d at 340, n. 21.

23 *Riggio*, 70 F.3d at 340, n. 22.

24 91 F.3d 699 (5th Cir.1996), cert. denied, *Branch v. United States*, 520 U.S. 1185, 117 S.Ct. 1467, 137 L.Ed.2d 681 (1997).

> randomly summoned from the community at large to decide the single case before them and, once done, to "inconspicuously fade back into the community." "Anonymous jury" has come to mean something different in recent years, signaling the district court's decision to withhold certain biographical information about potential jurors from the parties involved. That said, we should be wary of painting with too broad a brush. "Anonymous" juries include those about whom more has been concealed than here. The jurors here were not "anonymous" except in the most literal sense. The district court ordered only the jurors' names and addresses be withheld from the parties. Otherwise, the court provided the defendants with a wealth of information about the venire, including occupations and names of employers.[25]

Thus, the Fifth Circuit does not consider a district court's decision to withhold the names and addresses of the jurors to truly qualify the jury as "anonymous."

The *Branch* Court further stated that the trial court is required to "make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings."[26] In discussing the *Krout* factors, the Fifth Circuit stated that there was no intent to suggest that "these

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[25] *Branch*, 91 F.3d at 723 (citations omitted).

[26] *Branch*, 91 F.3d at 723 (citing *United States v. Childress*, 58 F.3d 693, 702 (D.C.Cir.1995), cert. denied, 516 U.S. 1098, 116 S.Ct. 825, 133 L.Ed.2d 768 (1996)).

or some aggregate must be established on pain of reversal."[27] The Court stressed that district courts should look to the "totality of the circumstances."[28]

The trial court in *Branch* based its decision to withhold the names and addresses of the jurors on a number of factors. Specifically, the court found that an anonymous jury was proper "because of the 'enormous amount of world-wide attention' generated by the case and the emotionally charged atmosphere surrounding it. Not all celebrated trials merit an anonymous jury, but '[t]he prospect of publicity militates in favor of jury anonymity to prevent exposure of the jurors tc intimidation or harassment.'"[29] Because the defendants in *Branch* were furnished with answers to eighty (80) detailed questions, the defendants' ability to select an impartial jury had not been prejudiced. The Court also emphasized that at voir dire, "the court asked the defendants' proposed questions and elicited additional information regarding potential juror bias."[30] In rejecting the defendants' assertion that their ability to select an impartial jury had been impaired, the court noted that defense counsel had available an "arsenal of information" about each prospective juror.

In *United States v. Sanchez*,[31] the trial court redacted certain identifying juror information because of a 10-day

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27 *Branch*, 91 F.3d at 724.

28 *Branch*, 91 F.3d at 724 (citing *United States v. Ross*, 33 F.3d 1507, 1521 (11th Cir.1994)) (emphasis added).

29 *Branch*, 91 F.3d at 724 (citations omitted) (emphasis added).

30 *Branch*, 91 F.3d at 725 (citing *United States v. Wong*, 40 F.3d 1347, 1377 (2nd Cir.1994) (upholding anonymous jury where "extensive" voir dire adequately explored prospective juror bias)).

31 74 F.3d 562 (5th Cir.1996).

delay between jury selection and the commencement of the evidentiary phase of the trial and the potential fears of jurors in adjudicating the guilt or innocence of a "rogue" police officer. The Fifth Circuit reversed the district court's decision to empanel an anonymous jury, concluding that there was no evidence that the defendant had attempted to interfere with the judicial process or witnesses, and there was no indication that the jurors would be subjected to the type of extensive publicity that might bring about intimidation and harassment. The Court held that the district court's decision must rest on more than "mere allegations or inferences of potential risk."[32] Based upon the dearth of evidence supporting use of an anonymous jury in *Sanchez*, the Fifth Circuit held that the trial court abused its discretion.

The Fifth Circuit continued its evaluation of the use of anonymous juries in *United States v. Salvatore*[33] which involved seventeen defendants who were indicted for operating a criminal enterprise that subverted the licensing requirements of Louisiana's Video Poker Law, charges similar in nature to those contained in the present indictment. Fourteen of the seventeen defendants pled guilty prior to the trial. The district court empaneled an anonymous jury. The trial court found that *Salvatore* and the Tusas were closely connected with organized crime. The government also submitted evidence which showed that there was an ongoing investigation into possible jury tampering in connection with one defendant's acquittal of criminal charges in state court. Furthermore, there was evidence indicating that certain defendants showed a "willingness to interfere with the judicial process,"[34] namely their guilty pleas to the video

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32 *Sanchez*, 74 F.3d at 564 (citing *Krout*, 66 F.3d at 1427).

33 110 F.3d 1131 (5th Cir.1997).

34 110 F.3d at 1144.

poker conspiracy. The Court also found that extensive publicity surrounding the trial "enhance[ed] the possibility that the jurors' names would have become public."[35]

In affirming the trial court's decision to empanel an anonymous jury, the Fifth Circuit reiterated the factors previously set forth in *Krout* which may be considered by a trial judge. The Fifth Circuit also noted that a "**district court may certainly consider evidence other than that relating to these five factors** when deciding whether to empanel an anonymous jury, for the decision to do so should be based upon the 'totality of the circumstances.'"[36] Two of the defendants who had pled guilty in Salvatore also pled guilty to jury tampering in a prior case. The Fifth Circuit stated that the involvement of these two defendants in the video poker conspiracy "establishes that [the three] appellants participated in a criminal enterprise and conspired with individuals having the capacity and willingness to interfere with the judicial process."[37] Thus, a defendant's association with persons who have the capacity or willingness to interfere with the judicial process may be considered by the trial judge in determining whether to empanel an anonymous jury.[38] In addition to the fact that the three appellants in *Salvatore* were connected with organized crime, the Fifth

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35 110 F.3d at 1144.

36 *Salvatore*, 110 F.3d at 1143 (citing *Branch*, 91 F.3d at 724 (emphasis added)).

37 110 F.3d at 1144.

38 Such is the case before the Court. A number of persons have pled guilty to related charges set forth in *United States v. Edwards* and *United States v. Brown*. These pleas clearly show an association with persons who have the capacity or willingness to interfere with witnesses or the judicial process.

Circuit noted the following upon review: (1) the defendants initially faced potentially long sentences; and (2) "the publicity surrounding the trial was quite extensive, thus enhancing the possibility that the jurors' names would have become public." [39]

While most of the Fifth Circuit cases in which anonymous juries were approved involved persons associated with organized crime (with the exception of *Branch*), it is clear that this is *not* a required factor under the Fifth Circuit jurisprudence. The "organized crime factor" weighs heavily in favor of an anonymous jury, but it is only *one* of the numerous factors which may be considered based on the "totality of the circumstances" of the case. [40] In *Branch* and *Salvatore*, the Fifth Circuit discussed the factors enumerated in *Krout* and stressed that those factors were not the sole matters to be considered by the court in making its decision. In *Branch*, the Court, noted that "[o]ther circumstances may also justify [the use of an anonymous jury]. Indeed, while evidence that the defendant has in the past or intends in the future to tamper with the jury may be sufficient to warrant an anonymous jury, it is by no means necessary." [41] Thus, under Fifth Circuit jurisprudence, the analysis the Court must make in deciding whether to use an anonymous jury is fact intensive and depends upon the particular and total circumstances involved in the case. It is also clear that the use of an anonymous jury satisfies constitutional muster "when needed to ensure against a serious threat to juror safety provided the defendant's interest in the conduct of an

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39 *Salvatore*, 110 F.3d at 1145.

40 *See*, *Salvatore*, 110 F.3d at 1135 (citing *United States v. Branch*, 91 F.3d 699, 724).

41 *Branch*, 91 F.3d at 724 (citations omitted).

effective voir dire of prospective jurors and the presumption of innocence are maintained."[42] A lower court's decision to empanel an anonymous jury is entitled to deference and is subject to abuse of discretion of review. [43]

The Court now turns to a review of the evidence which supports the Court's decision to empanel an anonymous jury in this case.

ANALYSIS

It is clear from the Fifth Circuit jurisprudence that a trial court may consider various forms of evidence in deciding whether to empanel an anonymous jury. The list of factors set forth in *Krout* is not intended to be exhaustive. In fact, a court must look to the totality of the circumstances and may consider additional factors beyond those enumerated in *Krout*. The courts may receive evidence in camera and/or ex parte. [44] A motion for anonymous jury may also be determined by the trial court without any hearing on the matter.[45] The evidence presented to the Court in connection

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[42] *Riggio*, 70 F.3d at 339.

[43] *Krout*, 66 F.3d at 1426.

[44] *See, United States v. Paccione*, 949 F.2d 1183 (2nd Cir. 1991) (court considered affirmations received in camera, ex parte); *United States v. Salvatore*, 110 F.3d 1131 (5th Cir. 1997) (court considered evidence in camera; ex parte). While the Court did receive from the United States an affidavit which complained of an alleged threat signed by Sid Moreland, the Court did not consider this information about an alleged threat in making its decision. During the trial, the Court ordered the United States to give a copy of the Moreland affidavit to the defendants while Moreland was testifying.

[45] *Krout*, 66 F.3d at 1420 (no hearing held and the court relied upon unsworn affidavits); *United States v. Edmond*, 52 F.3d 1080 (D.C.Cir.1995) (sua sponte and without a hearing); *United States v.*

with the government's motion for anonymous jury, the testimony and exhibits presented during the course of the trial, matters pertaining to the jury which occurred during the trial, and extensive media attempts to contact the jurors during the trial clearly support the Court's decision to empanel an anonymous jury. There was also a serious concern on the part of some jurors about being identified during voir dire and after the trial. This important factor was considered by the Court and also supports the Court's decision herein.[46]

A review of this evidence is in order.

A number of factors weigh in favor of an anonymous jury in this case. First, the nature of the charges brought against Edwin and Stephen Edwards in this case and the nature of the charges brought against Edwin Edwards and others in *United States v. Brown* are indicative of attempts by Edwin Edwards and Stephen Edwards and others associated with them to interfere with the judicial process or witnesses. Edwin Edwards and Stephen Edwards are charged in Count 33 of the superseding indictment in this case with illegal wiretapping and counter surveillance of an FBI agent.[47] A co-defendant, Dempsey White, has already pled guilty to a

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Eufrasio, 935 F.2d 553 (3rd Cir. 1991) (hearing not required as a matter of law, though it is a better practice to record findings and reasons when empaneling anonymous juries); *United States v. Wilson*, 160 F.3d 732 (D.C. Cir. 1998) (evidentiary hearing was unnecessary where court relied upon the charges in the indictment and prosecutor's affidavit).

46 *See*, Rec.Doc. No. 1350 (Minute Entry which indicated nine of the eleven jurors did not want to be contacted by the press).

47 This charge was severed with the consent of all parties.

crime relating to the allegations set forth in Count 33.[48] The other charges set forth in this indictment also show a pattern to disregard the judicial and administrative process established by the State of Louisiana for the proper selection of licenses to operate gaming riverboats in Louisiana.[49]

In the indictment returned against Edwin Edwards in *United States v. James Harvey Brown, et al.*, Edwin Edwards is charged with tampering with a witness pursuant to 18 U.S.C. § 1512(b)(3).[50] Judge Edith Brown Clement recently granted the government's motion for an anonymous jury in that case.[51]

Both the government and the defendants submitted evidence pertaining to matters involving jury selection and possible jury tampering in two earlier criminal trials involving Edwin Edwards in the Eastern District of

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48 Dempsey White plead [sic] guilty to the offense of misprision of a felony relative to his failure to reveal the existence of these criminal acts to the authorities.

49 A number of persons plead [sic] guilty to these charges and testified at the trial.

50 The Court recused itself in the *Brown* case for reasons unrelated to this case. See Rec.Doc. Nos. 254, 261 (Cr-99-151). When ruling on the pending anonymous jury motion, the Court was not required to make credibility determinations of any potential witnesses in the *Brown* case. As noted elsewhere in this opinion, the Court is not required to look beyond the allegations of certain facts that, if true, would justify the impanelment of an anonymous jury. Even if the Court excludes the allegations against Edwin Edwards which are set forth in the indictment in *Brown*, an anonymous jury would still be warranted under the facts of this case. While the defendants have filed a motion to recuse this Court in this case because of its recusal in *Brown*, neither the law nor the evidence in this case requires recusal. See Rec.Doc. No. 1489.

51 Rec.Doc. No. 270 (Cr-99-151).

Louisiana in the 1980s. There are numerous affidavits presented from the current and former Commandants of the Louisiana State Police, attorneys in the former cases and others who may have been involved in the jury selection process. This Court does not believe it is necessary for the Court to determine with certainty whether all of the events which were alleged in these affidavits actually occurred. The potential for these events to have interfered with the judicial process is sufficient evidence for the Court to take into consideration, together with the other evidence in this case. Indeed, there was very credible evidence presented in the form of affidavits which suggest that the methods used to select jurors in the earlier cases had the potential to affect the judicial process in the earlier case.

The evidence presented during the course of the current trial also established that Andrew Martin had the potential for interfering with the judicial process. In a taped conversation which occurred in Edwin Edwards' office on January 9, 1997, Andrew Martin states that he has obtained a transcript of a wiretap from a "friend of a friend."[52] The transcript of this conversation,[53] which was played to the jury in connection with the Treasure Chest scheme provides:

[AM—Andrew Martin

EWE—Edwin W. Edwards]

AM: (UI). (Greetings in French)

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[52] This tape and the corresponding transcript were introduced in connection with the Treasure Chest scheme. Andrew Martin was found guilty on charges related to this scheme.

[53] Designated by the government during trial as transcript number 110.

EWE: (UI) what you got there? (Rustling noises heard)

AM: You uh, see this? It's on the transcript of the wire tap for, from LARRY.

EWE: From LARRY?

AM: Yeah.

EWE: The whole thing?

AM: No. You want the whole thing?

EWE: Anything about you in here?

AM: No. Uh huh.

EWE: Huh?

AM: Uhn huh.

EWE: Anything about me?

AM: No. Have the DEQ guy KUARSKI (ph) in there. (Pause) I don't need it. You can have it if you want to. I'll let you have it but I'd like to get it back if I can. If you uh you wanna read it. (Pause in conversation)

AM: As long as you're not in there you don't care uhh Chief. (Chuckles). But some of the stuff it said, LARRY really, you Know **[sic]** . . .

EWE: Come on strong.

AM: (Sighs). I'll tell you what you know, some of that, some of that stuff he, language he said was, uh, was something else.

(Pause)

EWE: A lot of loose tongues in here.

AM: So you really don't realize after you read one of these things what they can do, what they can't do.

(Pause)

EWE: Where did you get this?

AM: Friend of a friend of a friend.

(Chuckles)

(Pause)

AM: You want it you can have it. I really don't need it.

EWE: Huh?

AM: I really don't need it. You can have it if you want it.

EWE: I'll take it and I'll read it just for the hell of it.

It is also appropriate to consider crimes charged in an indictment when determining use of an anonymous jury.[54] The crimes charged in the indictment in this case clearly

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54 *See, Riggio*, 70 F.3d at 336 (defendant accused of jury tampering in a previous case).

suggest attempts to corrupt the legal system of selecting licenses under the laws and regulations of the State of Louisiana pertaining to riverboat gaming licenses. These matters may also be considered against all of the defendants. The allegations become even more relevant when the Court considers the number of persons associated with the defendants who have plead [sic] guilty to charges related to the indictment returned in this case.

In *United States v. Salvatore*,[55] the Fifth Circuit affirmed the trial court's consideration of a "current" investigation of jury tampering on the part of a co-defendant and consideration of the appellants' alleged involvement in a video poker conspiracy with two co-defendants who pleaded guilty to the conspiracy prior to empaneling an anonymous jury. The Fifth Circuit stated that these considerations established that the "appellants participated in a criminal enterprise and conspired with individuals having the capacity and willingness to interfere with the judicial process."[56] The same situation is presented in the present case with regard to Edwin Edwards, Stephen Edwards and Andrew Martin and their co-conspirators. In *Salvatore*, the Fifth Circuit said it was proper for the trial court to consider an ongoing investigation into possible jury tampering on the part of a co-defendant in support of using an anonymous jury. The evidence is even stronger in the present case. Here, an investigation resulted in two indictments being returned against Edwin Edwards for allegedly trying to engage in illegal wire tapping, witness tampering and engaging in the other conduct alleged in the indictment in this case and in *United States v. Brown*. In addition, co-defendants and other persons have entered guilty pleas to charges related to those

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55 110 F.3d at 1131.

56 110 F.3d at 1144.

in the two cases. In addition, Stephen Edwards was charged with similar conduct in this case and a taped conversation revealed Andrew Martin's ability to obtain a transcript of a wiretap conversation that he was not entitled to have regarding on ongoing investigation. These allegations taken together with the allegations set forth in the affidavits pertaining to jury selection utilized by Edwin Edwards in the two Edwin Edwards trials conducted in the Eastern District of Louisiana clearly show that these defendants have the capacity, ability and willingness to interfere with the judicial process and witnesses.

In *United States v. Riggio*, the Fifth Circuit approved the trial court's consideration of facts indicating that the defendant "had been accused of jury tampering in a previous case" in support of empaneling an anonymous jury.[57] Thus, in the Fifth Circuit, a court may consider charges lodged outside of the pending criminal case in determining whether an anonymous jury is warranted. The Court in *Riggio* also held that evidence adduced at trial may be considered by the appellate court in determining the propriety of the trial court's decision.[58]

As noted earlier in this opinion, it is appropriate for the Court to consider the nature of the crimes charged in the indictment.[59] The defendants in the present case were

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57 70 F.3d at 338.

58 *See, Krout*, 66 F.3d at 1427 (citing *United States v. Wong*, 40 F.3d 1347, 1376-77 (2nd Cir.1994)). This is particularly important in this case. As will be seen later in this opinion, the Court's concern about media coverage proved to be a valid concern. Furthermore, the tapes played during the trial also confirmed conclusions reached by the Court when it made the decision to empanel the jury and withhold the names, addresses and places of employment of the jurors.

59 *Riggio*, 70 F.3d at 340.

accused of being part of a broad-based conspiracy to interfere with the lawful process established by the State of Louisiana for issuance of gaming licenses to operate riverboats in Louisiana.[60] All of the defendants except Ecotry Fuller[61] were charged as members of a criminal enterprise, the objective of which was to manipulate the lawful licensing process for riverboats in order to enrich themselves and their associates and family members. These allegations support the Court's finding that the defendants had a propensity or willingness to interfere with the lawful state licensing process. The fact that the jury found all of the defendants except Tarver and Fuller guilty of some of these charges only confirms the concern the Court had at the beginning of the trial about the defendants' ability and willingness to interfere with the licensing process.

In determining whether to empanel an anonymous jury, the Fifth Circuit has held that the court may also consider the potential that, if convicted, the defendants face lengthy incarceration and substantial monetary penalties. Such is the case pending before the Court. Under the indictment, the defendants were faced with the following maximum sentence of imprisonment and monetary fines and forfeiture: (1) Edwin Edwards: 350 years of imprisonment, a fine of $7,250,000.00, or both; the Court could also impose restitution and/or a forfeiture in the amount of $3,129,000.00; (2) Stephen Edwards: 300 years of imprisonment, a fine of $500,000.00, or both; the Court could also impose a restitution and/or forfeiture in the amount of $3,129,000.00; (3) Cecil Brown: 80 years of imprisonment, a fine of $1,000,000.00, or both; the Court could also impose a

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60 Rec.Doc. No. 311 at 3 (Amended Joint Proposed Summary of Indictment) (emphasis supplied).

61 Ecotry Fuller and Greg Tarver were acquitted by the jury.

restitution and/or forfeiture in the amount of $2,425,000.00; (4) Andrew Martin: 120 years of imprisonment, a fine of $1,750,000.00, or both; the Court could also impose a restitution and/or forfeiture in the amount of $2,425,000.00; (5) Bobby Johnson: 75 years of imprisonment, a fine of $2,250,000.00, or both; (6) Gregory Tarver: 55 years of imprisonment, a fine of $2,750,000.00, or both; and (7) Ecotry Fuller: 60 years of imprisonment, a fine of $3,000,000.00, or both.

Thus, each defendant at the time the Court issued its original opinion faced substantial terms of imprisonment and staggering penalties and forfeitures. All but two of the defendants continue to face lengthy jail sentences, fines and forfeitures following the jury's verdict. The fact that some defendants were acquitted of all charges and other defendants were found not guilty on some counts does not change the analysis. In *Salvatore*, the Fifth Circuit held that the relevant inquiry is whether the defendants are initially facing potentially lengthy prison sentences and monumental financial penalties.[62]

The publicity and the emotional, political climate surrounding the trial are additional factors which the Court may and did consider in determining whether to empanel an anonymous jury. The Fifth Circuit acknowledged the existence of the extensive news coverage in its opinion affirming the Court's gag order in *U.S. v. Brown*.[63] Extensive publicity of these proceedings enhance **[sic]** the possibility that jurors' names would become public, thereby exposing them to possible intimidation and harassment.[64]

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62 110 F.3d at 1144.

63 See U.S. v. James Harvey Brown, 218 F.3d 415, 427 (5th Cir.2000).

64 *Salvatore*, 110 F.3d at 1143.

This case has received extensive media coverage before, during and after the trial. This Court entered two standing orders pertaining to media coverage, reserved seating, credentials, a "bull pen" for interviews and reserved parking for media trucks on a closed lane of a public street.[65] This Court has outlined in other opinions the extensive procedures the Court was required to put in place to accommodate the numerous local and national media representatives who wanted to attend and cover the trial. The record also reflects the numerous motions filed by the press before, during and after trial seeking the names, addresses and places of employment of jurors. The media has also sought to obtain the juror questionnaires, all *in camera* hearings pertaining to jurors, and the entire sealed record. Courts have recognized that "[a] trial judge is usually well-aware of the ambience surrounding a criminal trial and the potential for juror apprehensions."[66] The Court's decision to withhold juror identifying information "'requires a trial court to make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings.'"[67] The trial judge's assessment is given due deference by the appellate court. The evidence in this case not only reflects the Court's apprehension and concern, but the concern and apprehension of some jurors about being identified publicly.

Some background regarding the parties is appropriate and necessary for a full understanding of the facts surrounding media coverage and the emotional, political

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65 Rec.Doc. Nos. 47 and 292.

66 *United States v. Eufrasio*, 935 F.2d 553, 574 (3rd Cir.1991).

67 *Branch*, 91 F.3d at 723 (citing *United States v. Childress*, 58 F.3d 693, 702 (D.C.Cir. 1995)).

climate that existed herein. One of the defendants is Edwin Edwards, a four-term Governor of the State of Louisiana. It is easy to conclude that Edwin Edwards is a powerful, influential figure in Louisiana's political history. As a result, he is and has been the subject of intense media coverage during his political career. The current indictments only increased the media's interest in Edwin Edwards.

In 1985 and 1986, Edwin Edwards was tried in the Eastern District of Louisiana on charges relating to interfering with the lawful process of licensing for nursing homes. The first trial ended in a hung jury. The former governor was acquitted of all charges during the second trial. Both of these trials received national media attention. The indictment in this case and in *Brown* have also been the subject of intensive media and public interest as indicated by the news clippings set forth in the appendix.

Also named as a defendant in this case is the former governor's son, Stephen Edwards, who has also been the subject of extensive media coverage. Three of the former governor's associates, Andrew Martin, Bobby Johnson and Cecil Brown, are also included in the indictment. Finally, a powerful state senator and a member of the state gaming board were named as defendants. The potential witness list included Eddie DeBartolo, the former president of the San Francisco 49'ers professional football team and Super Bowl champions, and Cleo Fields, a former congressman and current state senator. Witnesses such as these increased the already extensive media attention and pre-trial coverage. This interest increased even more during the trial when Eddie DeBartolo and other members of his staff testified and during the playing of the video tape of a meeting between Senator Fields and Edwin Edwards. Indeed, the media interest continues today and there are now pending before the Court numerous media motions and requests seeking to copy the

audio and video tapes played to the jury as well as other evidence, exhibits and pleadings. The media also filed a mandamus action against the Court in the Fifth Circuit on July 13, 2000 seeking this and other information.[68]

This trial was expected to last three months, but actually took longer because of illnesses of the parties and jurors and other factors. The trial began on January 10, 2000 and a verdict was returned on May 9, 2000. The media coverage was and is as extensive as the Court thought it would be at the time the Court granted the government's motion. "The prospect of intense publicity militates in favor of jury anonymity to prevent exposure of the jurors to intimidation or harassment."[69]

During voir dire, many members of the jury panel expressed concerns about being identified. Many of the jurors who were picked to serve on the jury expressed similar concerns. After the jury returned its verdict, nine of the eleven members of the trial jury[70] requested the Court to advise the media that they did not wish to be contacted.[71] However, this is only the beginning and not the ending of the story regarding the media coverage of the jurors. When rendering its opinion granting the government's motion to empanel an anonymous jury, the Court was concerned about juror apprehension, intimidation and harassment by the media and other persons who were not even directly involved

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68 5th Circuit Docket # 00-30702.

69 *Wong*, 40 F.3d at 1377 (citation omitted).

70 One juror was excused during deliberations. Under Rule 23 of the Federal Rules of Criminal Procedure, the jury was allowed to continue its deliberations with eleven jurors.

71 Rec.Doc. No. 1350.

in the case, but who had strong feelings for or against parties and the charges.

In addition to concerns about the media coverage, other events involving third parties and their contacts with the jurors or allegations which occurred during the trial support the Court's decision herein. Despite the anonymity ordered by the Court, the media, upon learning the name of one juror, published the juror's name in the newspaper.[72] It seems highly likely that if the jurors were not given anonymity, there would have been widespread dissemination of their names, addresses and places of employment, thereby subjecting them to possible harassment or intimidation from the media and others. Indeed, this very thing happened during the trial as will be discussed later. The Court can only wonder what additional problems the Court and the jurors would have had if the names, addresses and places of employment of the jurors were made public. Following are a few examples of the problems the Court faced despite the numerous precautions taken by the Court.

For the convenience and protection of the jurors, the jurors reported to a location away from the courthouse where United States Marshals picked up the jurors and transported them to and from the courthouse each day. This procedure did not deter the press from attempting to locate where the jurors were parking their cars or from attempting to identify jurors presumably by obtaining their identity from license plate numbers on the jurors' cars. Some members of the media discovered the location where the jurors met and attempted to video tape and talk to some of the jurors. After the jury's verdict on the guilt and innocence phase of the trial, but prior to the final verdict on the issue of forfeiture

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72 The juror's name was known because he was employed as a reporter by that newspaper.

and their discharge as jurors, some members of the media appeared at the homes of jurors to interview jurors presumably about their verdict.

During the voir dire, each juror was questioned individually in open court with the parties, public and media present. Newspaper articles were published about the answers given by the jurors. These detailed answers caused some jurors to be identified by co-workers, friends and others even though their names and places of employment were withheld from the parties, media and public. Jurors were also required to give their opinions about Edwin Edwards and the other defendants, gambling, wiretaps, use of informants, plea bargains and people who dealt in large sums of cash. It was important for this jury to be able to express honest opinions about these and other questions without being concerned about harassment or other contact from the media or any other person. There was little, if anything the Court could do to prevent certain stories from being published. For example, although sealed to protect their identity, a list of 61 unindicted co-conspirators was published and widely disseminated by the media.[73] The Court's gag order did not seem to deter the press from seeking interviews of the defendants, attorneys or witnesses. This is not a criticism of the media's desire and right to cover this case in accordance with the rights guaranteed to the press under the Constitution and jurisprudence. It is, however, justification for trying to protect the identity of the jurors and free them from being questioned, harassed or otherwise bothered and intimidated during and after this lengthy trial.

The Court also believed it was important to shield the jurors from improper contact, harassment and possible

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73 The Court has been unable to determine how and from whom the reporter obtained this sealed document.

influence from the general public and others. A cursory review of the answers given by the prospective jurors to questions set forth in the juror questionnaire reveals a good sample of the public's feelings about the parties and charges brought against the defendants. The emotional, political atmosphere that surrounded this case could not be avoided. No juror serving in a case where there is such high public interest as this case should have to be concerned about being contacted, influenced or harassed by the general public or anyone else. The Court concedes that not every case where there is extensive media interest justifies or requires an anonymous jury. But when, as in this case, a totality of the facts suggest the potential that the jurors will be exposed to intense media coverage that could lead to possible intimidation and harassment, an anonymous jury is necessary.

Despite the best efforts of the Court and the United States Marshal's Service, some individuals did attempt to cause problems for some jurors because of personal bias against a juror, personal relationships with the parties and other reasons. This caused the Court to conduct several hearings which required the jurors and in some cases, their families, to be questioned by the Court. The Court believes that the use of the anonymous jury prevented more of this type of conduct. The Court's decision to withhold the jurors' identities allowed the jury to concentrate on the evidence and proved to be a substantial deterrent to intentional or accidental contact and influence on the jury. This protection also lessened the prejudice which could arise from such actions, innocent though they may appear. The Court's action also ensured all of the parties a fair and impartial trial.

The Court cannot overlook the emotional, political atmosphere that surrounded this case. As noted earlier, Edwin W. Edwards was a four-term governor of Louisiana.

A state senator and a member of the state gaming board were also named as defendants. Witnesses include a mayor, chairman of the gaming board and members of the former governor's staff. The potential witness list included many current and former political appointees and state employees. To "minimize the prejudicial effects of the pretrial publicity surrounding this trial and an emotional, political atmosphere that created a risk of jury intimidation and improper influence,"[74] the Court withheld the names, addresses and places of employment of the jurors. The Court does not believe there were any other alternatives under the totality of the facts in this case. The Sixth Circuit upheld similar action taken by the trial judge in *U.S. v. Dakota*,[75] **[sic]** The totality of the facts of this case create a similar, if not greater need for the Court's action than those set forth in *Dakota*.

Certain defendants have argued that because the government's evidence in support of an anonymous jury did not pertain to all of the defendants,[76] it would be unfair and prejudicial to require an anonymous jury for all of the defendants. This argument is without merit. The defendants are incorrect in their assessment of the evidence and the jurisprudence which the Court followed in reaching its decision. Furthermore, defendants' argument was rejected in *United States v. Ross*.[77] In *Ross*, the Eleventh Circuit stated that "[e]ven though the government did not prove that these incidents were related to Appellant or another co-conspirator,

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74 *United States v. Dakota*, 188 F.3d 663, 668 (6th Cir.1999).

75 188 F.3d at 663.

76 There is evidence relating directly to defendants Edwin Edwards, Stephen Edwards and Andrew Martin. There is also evidence related directly to persons associated with the defendants in this case.

77 33 F.3d 1507 (11th Cir.1994).

the court nevertheless properly considered them in establishing an anonymous jury."[78] What the defendants fail to acknowledge is the fact that six of the seven defendants in this case are charged as members of a criminal enterprise to manipulate the lawful state licensing process in order to enrich themselves and others via extortionate activities. Some of the alleged objectives of the enterprise include actions of the defendants: (1) to enrich the members of the enterprise as well as their associates, friends, families, and partners, through the illegal manipulation and corruption of the lawful system to award riverboat gaming licenses, in order to ensure that licenses would be awarded to those applicants supported by the enterprise; (2) to enrich the members of the enterprise [and related others] by extorting payments from riverboat license applicants, thus manipulating the lawful licensing process; (3) to enrich the members of the enterprise [and related others] by ensuring that the gaming operations benefitting Edwin Edwards and the members of the enterprise would not be economically harmed or otherwise affected by adverse political action; (4) to secretly divide and launder the proceeds of the enterprise's racketeering activity; (5) to implement any means deemed necessary, including using, endeavoring to use, and procuring other persons to use illegal electronic wiretaps to intercept telephone communications of government agents and prosecutors, in order to corruptly formulate defenses and countermeasures to the government's investigation of the enterprise.[79] It is clear that the Court may consider the evidence pertaining to one co-conspirator against the other co-conspirators and members of the criminal enterprise when deciding whether to empanel an anonymous jury.

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78 33 F.3d at 1521 n. 25 (citation omitted).

79 Rec.Doc. No. 306, pp. 8-10.

While Ecotry Fuller is not alleged to have been a member of the aforementioned criminal enterprise, he was charged in this case with perjury before a federal grand jury regarding his statements about the executive summary. The allegation that Mr. Fuller made false statements to a grand jury while under oath is indicative of a willingness to subvert the lawful judicial process.

It is also obvious that neither Gregory Tarver nor Ecotry Fuller were prejudiced by the Court's decision to grant the government's motion. Both were found not guilty on all charges brought against them. Furthermore, not guilty verdicts were returned on other charges and racketeering acts brought against some of the other defendants. It is clear that the jury gave very careful consideration to all of the evidence brought against each defendant and based their verdicts on the evidence and not the fact that their names had not been disclosed. There was never any indication or suggestion made to the jury by the Court or any attorney involved in the case that the defendants were violent or dangerous. The Court's charge mentioned elsewhere in this opinion dispelled any suggestion that names of jurors were withheld because the defendants might physically harm the jurors or their families. The fact that numbers instead of names were used by the jurors did not prejudice the defendants or interfere with the jury's ability to fairly and impartially render a proper verdict herein.[80]

Judge Edith Brown Clement's decision in *United States v. Carollo*[81] supports the Court's decision to empanel

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[80] This is particularly so given the substantial information given to parties about the jurors.

[81] No. 94-158, 1995 WL 591322 at *2 (E.D.La. Aug.28, 1995) (not reported in F.Supp.) (court empaneled an anonymous jury where the

an anonymous jury even when some of the evidence presented in support thereof does not directly relate to every defendant. After Judge Clement determined that the jury in *Carollo* would be anonymous, a number of the defendants moved for separate trials. These defendants argued that they would be unfairly prejudiced by the "decision because the jury will assume that all of the defendants are dangerous, where in reality the Court's decision to empanel an anonymous jury was based on the histories of only a few defendants."[82] The Court refused to grant separate trials, finding that the prejudice feared by the defendants could be cured by limiting instructions to the jury. This Court gave similar limiting instructions to the jury. Because of the verdicts rendered by the jury, it is obvious that the jury not only followed these instructions, but actually returned not guilty verdicts on all charges brought against two of the parties who were complaining of prejudice. The jury also found Edwin W. Edwards and Stephen Edwards not guilty on some charges and racketeering acts. It is apparent that the jury followed the Court's limiting instructions on why numbers were used instead of names.

There is a consensus among all circuits that have considered the anonymous jury issue that once the decision to empanel an anonymous jury is made, the trial court must take appropriate action to ensure the parties are given adequate voir dire to allow the parties to have sufficient information to meaningfully exercise their challenges. The focus of the inquiry is whether the defendants were prejudiced in selecting an impartial jury because relevant and meaningful information was withheld from them. A

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backgrounds of some of the defendants necessitated it, while the backgrounds of others did not).

82 1995 WL 591322 at *1.

common sense reading of the jurisprudence indicates that the mere disclosure of the name of a person is not particularly enlightening insofar as gleaning information about the biases, beliefs, prejudices and values of that person. As the record will reveal, the parties were provided with extensive information about each juror. There were only three things the parties did not know: the juror's name, specific address and specific place of employment. However, the parties did know in which parish and what zip code each juror currently lived and a history of prior places where the juror lived. The parties were also provided with extensive information about the juror's current and prior employment history. This information provided to the parties will be discussed in detail later in this opinion and it is also indicated on the juror questionnaire which is attached as an exhibit in the appendix of this opinion.

Numerous courts have upheld a trial court's decision to empanel an anonymous jury when extensive voir dire and answers to questionnaires are provided. The thrust of the inquiry is whether "measures are taken to inform a defendant of jury demographics and to permit ample voir dire,"[83] so that a defendant's right to intelligently exercise peremptory challenges is not impaired. In *United States v. Branch*,[84] the Fifth Circuit held that there was no showing that refusing to release the names and addresses of the jury prejudiced the defendants' ability to select an impartial jury.[85] The

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83 *Eufrasio*, 935 F.2d at 475 (citing *Scarfo*, 850 F.2d at 1015).

84 91 F.3d at 699.

85 91 F.3d at 724.

defendants in *Branch* were furnished with answers to 80 detailed questions submitted to prospective jurors.[86]

In the present case, the parties were provided with an "arsenal of information" based upon the extensive questionnaires completed by potential jurors, as well as the Court's individual voir dire of potential jurors. Specifically, the parties were provided with answers to 116 detailed questions submitted to prospective jurors.[87] The final questionnaire utilized by the Court was compiled from questions submitted jointly by the parties. Copies of the completed questionnaires prepared by the 125 jurors who were summonsed for the trial were given to the parties

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86 *See also, Eufrasio*, 935 F.2d at 574 (anonymous jury is justified as long as defendants are afforded full voir dire); *Paccione*, 949 F.2d at 1192 (when anonymous jury is warranted, the defendant's fundamental right to an unbiased jury is adequately protected by the court's conduct of a voir dire designed to uncover bias as to issues in the cases and as to the defendant himself); *United States v. Edmond*, 52 F.3d 1080, 1082 (D.C.Cir.1995) (voir dire was more than adequate to compensate for the information denied by juror anonymity; it elicited information about the prospective jurors' habits, activities, work experiences, and families that was far more extensive and detailed than appellants might have drawn from jurors' mere names and addresses); *Wong*, 40 F.3d at 1377 (despite withholding of jurors' names, addresses, and employers, the court questioned prospective jurors about their familiarity with the case, the defendants and the crime scenes, and inquired about their neighborhoods, marital status, employment, spouse's and children's employment, education, organizational affiliations, ethnicity, military service, and other matters; this "extensive voir dire adequately explored prospective jurors' bias" as to issues in the case and as to the defendants and "was more than sufficient to enable the defendants to exercise their challenges meaningfully, and to obtain a fair and impartial jury."); *United States v. Crockett*, 979 F.2d 1204 (7th Cir.1992) (names, addresses, and places of employment withheld, but district court conducted a "searching and thorough" voir dire).

87 A copy of the questionnaire is attached hereto.

several days prior to jury selection. This allowed the parties ample time to review the completed questionnaires.[88] The government and the defendants also submitted follow-up questions they wished the Court to ask during individual voir dire. But for the name, address and place of employment, the parties were provided with a wealth of information as to each potential juror. This included information about the age, race, medical problems, economic and other hardships, residential history,[89] family history and marital status, number of children, current employment status, occupation, nature of the employer's business, length of employment, size of company where the juror worked, prior jobs, training and employment for federal, state or local governments, training in business, financial or accounting, prior business investments and whether the juror's employer ever did business with the state. The questionnaire also provided information regarding the juror's education, military experience and background information regarding the juror's spouse or partner. The jurors also provided information about their activities, including volunteer work, involvement in education, religious, professional, political, or other union groups, and any leadership positions held. Jurors were required to disclose their political party affiliation and whether they considered themselves liberal, conservative, moderate or some other status. The jurors disclosed whether they or any member of their family had run, been elected or appointed to public office, had contributed to or made gifts to political candidates or campaigns or worked in such campaigns. In addition to the above, the questionnaire required each juror to state how closely they followed

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88 Because Edwin Edwards was hospitalized during jury selection, the parties had additional time to study the completed questionnaires.

89 This included information whether the juror owned or rented a home or lived with others and how long and where in Louisiana the juror lived.

Louisiana politics. Jurors set forth their religion, how often they attended church and whether there were any religious beliefs which prevented them from serving as a juror. Questions 57-71 asked jurors detailed information about gambling in Louisiana, religious beliefs regarding gambling and other knowledge about gambling laws, regulations, corruption in awarding riverboat licenses, any responsibility Edwin Edwards may have had for problems in the state gaming industry and opinions about people who deal in large sums of cash. Detailed questions were asked each juror about their prior jury service and their opinions of the court system.[90] Included in the questions about the court system were questions seeking the juror's opinions about plea agreements, use of informants, immunity and reduced sentences.

There were extensive questions directed to the jurors regarding any connections they had with the parties, attorneys and agents in this case. Questions were also asked about the media and pretrial publicity, opinions of jurors on the guilt or innocence of the defendants, the defendants' presumption of innocence and right to remain silent, the government's burden of proof beyond a reasonable doubt and the juror's obligation to follow the law as given by the judge. Finally, questions were asked of each juror whether they could serve in a fair and impartial manner. As will be noted later, jurors were then individually questioned during voir dire about the answers they gave in the questionnaire.

The Court summoned 125 jurors to appear on the first day of the trial. The Court began the voir dire by asking questions to the entire jury panel in a group after the jurors had been placed under oath. Then individual voir dire was conducted on each juror outside the presence of the other

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90 Questions 72-85.

jurors. The parties were allowed to exhaust every appropriate question relevant to this case either via the written questionnaire and by suggesting questions during the voir dire process. The transcript of voir dire will consist of approximately 2,000 pages.[91] The Court took eight days to actually empanel the jury. After all questions were asked of the jurors, the Court allowed the parties considerable time to again review the questionnaires and the answers given by the jurors during voir dire before requiring the parties to exercise their challenges. A review of the answers given during voir dire and the answers to the juror questionnaires reveals the parties had more than ample information to use in deciding which jurors to select, challenge for cause or peremptorily strike. In short, the information provided to the United States and the defendants was far more extensive and detailed than the parties could have obtained by just knowing the name, address and place of employment of a juror. The information obtained from the questionnaire and the voir dire adequately explained any bias or prejudice a juror may have had against a defendant, the government, and on the issues involved in the case. This information permitted the parties, including the defendants, to meaningfully exercise their challenges and to obtain a fair, honest and impartial jury. The defendants' fundamental right to an unbiased jury was adequately protected by the procedure used by the Court and the information provided by each juror.

This Court was cognizant of the defendants' constitutional rights to a presumption of innocence until proven guilty beyond a reasonable doubt. The Court was also aware that a neutral, plausible and nonprejudicial reason for anonymity must be provided to the jurors. Depending upon the particular case, these instructions should ordinarily

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91 Only 80 jurors were questioned individually before the Court obtained a sufficient pool to select the jury.

include some of the following: (1) defendants are entitled to a presumption of innocence; (2) the case is one of high profile; (3) the jurors are to remain anonymous because of the publicity surrounding the case and the need to shield jurors from the possibility of extra-judicial communications;[92] (4) use of an anonymous jury ensures that there will be a fair trial for both sides;[93] (5) empaneling an anonymous jury in no way suggests that improper communications have been made by either side;[94] and (6) it is common practice in many cases in federal court to keep the names and identities of the jurors in confidence.[95]

The jurors in the present case were provided with neutral, nonprejudicial reasons for the Court's decision in order to protect the defendants' constitutional right to a fair trial. The Court gave the following instruction to the jury:

> You have been randomly selected to serve as a potential juror in the trial of United States versus Edwin W. Edwards, Stephen Edwards, Bobby Johnson, Andrew Martin, Cecil Brown, Gregory Tarver and Ecotry Fuller.
>
> This case has attracted a high degree of publicity. To protect your privacy during the jury selection process and trial, you have been assigned an individual juror number which will be used to identify you. You must

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92 *United States v. DeLuca*, 137 F.3d 24, 32 (1st Cir.1998).

93 *Salvatore*, 110 F.3d at 1144.

94 *Salvatore*, 110 F.3d at 1144.

95 *Edmond*, 52 F.3d at 1093.

use your juror number at all times. This procedure has been followed in other highly publicized cases in federal court and is designed to protect the privacy of jurors during the court of the trial.

With any potentially high profile case, we are all subject to receiving phone calls and letters about the case and even inquiries from members of the media or from friends, neighbors or relatives. I want to ensure that there not be any such contact with members of the jury during the course of this trial. I also want to protect the defendants as well as the government from any belief on the part of the jury that any such communications are coming from one side or the other. In other words, I do not want the defendants or the government to be characterized as anyone who would be sending communications to the jury or as someone who is trying to improperly influence the jury.

The use of these procedures is to ensure that both sides will get a fair trial. It will also permit you the jury to perform your important duties without your privacy being invaded.

You are also to remember that the defendants have entered not guilty pleas to the charges brought against them. Therefore, they are presumed innocent unless and until the government proves their guilt beyond a reasonable doubt.

> Therefore, as we proceed today and throughout the remaining days of this trial, you should only use your juror number to identify yourself. Do not use your or your spouse's name, home or business address or the name or address of your employers in responding to questions or otherwise communicating with the Court.
>
> Are there any members of the jury who would have any bias, prejudice or negative feelings toward the United States or the defendants because of the Court's decision not to reveal your names to the public?

All jurors assured the Court that hey had no bias, prejudice or negative feelings toward the United States or the defendants because of the use of an anonymous jury. In addition to giving the quoted charge, the Court set forth the following language in the first questionnaire submitted to the prospective jurors:

> This case has attracted a high degree of publicity. To protect your privacy during the jury selection process and trial, you have been assigned an individual juror number which will be used to identify you. Your juror number is located in the top right-hand corner of the first page of the attached juror questionnaire and on each page thereafter. The procedure used in this case has been followed in highly publicized cases and is designed to protect the privacy of jurors during the course of the trial.

Defendants argue that empaneling an anonymous jury in this case effectively establishes a new category of cases

appropriate for that procedure. The Court disagrees. As noted earlier in this opinion, the Fifth Circuit in *United States v. Branch*[96] upheld impalement **[sic]** of an anonymous jury despite the fact that the defendants had no "ties to organized crime." After carefully considering the totality of the circumstances in this case, the Court concludes that empaneling an anonymous jury was necessary to protect the lawful administration of justice, ensure all parties a fair and impartial trial, protect the privacy of the jurors and protect the jurors from undue harassment, intimidation, and inquiries.

This is not the first case where a court has empaneled an anonymous jury where the defendants had no ties to organized crime. In *United States v. Branch*,[97] *United States v. Talley*[98] and *United States v. Dakota*[99] the appellate court affirmed the impalement **[sic]** of an anonymous jury even though links to organized crime were absent. In fact, if there was a specific requirement that organized crime be present before the courts can approve an anonymous jury, the appellate courts would have clearly stated such. The *Branch* decision has been previously cited and discussed herein. In *United States v. Talley*, there was no evidence of any involvement by the defendant in a "criminal organization that included a pattern of violence," nor was there evidence that Talley had ever attempted to tamper with any previous juries.[100] There was evidence, however, of Talley's

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96 *See, Branch*, 91 F.3d 699.

97 91 F.3d at 699.

98 164 F.3d 989 (6th Cir.1999).

99 188 F.3d 663 (6th Cir.1999).

100 164 F.3d 989, 1002 (6th Cir.1999).

dangerous propensities to do so. The Court also believed that Talley's "many years of law enforcement experience provided him with the types of contacts that would enable him to tamper with the jury."[101] In the present case, it is clear that Edwin Edwards' sixteen years of service as Governor of Louisiana have provided him with similar kinds of contacts.[102] This fact is borne out by the affidavits submitted in conjunction with the anonymous jury issue regarding the manner in which the juries were selected during the 1985 and 1986 trials of Edwin Edwards.[103] It appears that co-workers or fellow union members of potential jurors were contacted.[104] According to the affidavits, the jury selection and research process was "organized and efficient" and involved more than 100 close supporters of the former governor. Political operatives contacted friends, neighbors and co-workers of potential jurors. Research on the jurors continued during the course of the trial. There is some indication that a sheriff and some of his associates may have assisted in the jury selection process.[105] Additionally, FBI Agent Hultz interviewed Colonel Paul Fontenot, who was the primary trooper in charge of guarding Edwin

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[101] 164 F.3d at 1002.

[102] The court in *Talley* further found that the defendant's current charge of attempting to kill an F.B.I. agent in his case and a witness indicated that he had "already attempted to affect the judicial process." Although Mr. Edwards is not charged with attempting to kill an F.B.I. agent, he is charged with illegal wiretapping and counter surveillance of an F.B.I. agent in this case—evidence that he attempted to tamper with the lawful judicial process. He is also charged in *United States v. Brown* with tampering with a witness and bribing a judge.

[103] Rec.Doc. No. 1446.

[104] Rec.Doc. No. 975.

[105] Rec.Doc. No. 1449.

Edwards during the 1985 and 1986 trials. According to Agent Hultz, Colonel Fontenot, who was later named Commandant of the Louisiana State Police by Edwin Edwards, stated that during the previous trials, he was requested by members of Edwin Edwards' staff to perform records and license plate checks on various persons. Colonel Fontenot further stated that since the 1985 and 1986 trials, Stephen Edwards has requested him to perform background checks on various persons.

The statements contained in the affidavits submitted by all of the parties indicate the extensive resources which were and are available to Edwin Edwards to obtain information about jurors. It is also clear that during the prior trials, the defense team continued to receive information about the sitting jurors during the course of the trials. The defendants submitted some clarifying affidavits from some of the same persons from whom the FBI took statements. It is not necessary for the Court to resolve this conflict in the affidavits to a certainty. This evidence when combined with the other evidence considered by the Court strongly supports the Court's decision to withhold the names, addresses and places of employment of the jurors.

This Court can understand the need for gathering information about potential jurors in accordance with the local rules of court and the Federal Rules of Criminal Procedure to assist counsel in the selection of the jurors. However, once the trial jurors are seated, continuing research of the jurors creates the potential for prejudicial communications, innocent or otherwise, with a juror or a friend, family member or co-worker of a juror. Such contacts, though innocent in nature, can unduly influence a juror's decision. It is precisely this kind of communication, contact or influence which the Court in this case wished to avoid.

CONCLUSION

It is important to note that the Court did not just rely on the affidavits submitted with the motion to support its decision to withhold the name, address and place of employment from the parties, media and public. The Court also considered: (1) the nature of the charges pending in this case and in *Brown*; (2) the defendants' past attempts to interfere with the judicial process or witnesses; (3) the potential lengthy jail sentences and substantial monetary penalties the defendants were facing, if convicted; (4) the extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation, influence and harassment; (5) the potential and actual contact by the media and other individuals with members of the jury panel while the trial was being held; (6) the emotional, political atmosphere of this case; (7) juror apprehension about being identified or interviewed; and (8) the totality of the circumstances in this case.

The Court believes that empaneling an anonymous jury was the only manner in which the Court could ensure that the jurors in this case were protected from outside influence and intimidation from persons associated with the government, the defendants, the media, and individuals who had an interest for or against any of the parties or the jurors in this case.

The totality of all of the circumstances in this case establish a clear and actual need to withhold the names, addresses and places of employment of the jurors. The evidence which supports the Court's decision was clear at the time the Court made its initial decision to withhold the names, addresses and places of employment from the parties. The evidence presented at the trial, the media's actions and other events which occurred during and after the trial

established an absolute need for a "partially anonymous jury" in this case.

The answers given by the jurors to the questionnaire and to questions asked during the voir dire gave the parties more than sufficient information for the parties to make an informed decision on which jurors to accept, challenge for cause or peremptorily challenge. The jury was properly instructed by the Court why their names, addresses and places of employment were withheld. Finally, the jury's verdict shows these parties were not prejudiced because numbers instead of names were used by the jurors.

For these reasons, the motion of the United States for an anonymous jury is and was GRANTED.

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
CHIEF JUDGE FRANK J. POLOZOLA

UNITED STATES OF AMERICA **CRIMINAL ACTION**
VERSUS **NUMBER 98-165-B-M2**
EDWIN W. EDWARDS,
STEPHEN EDWARDS
CECIL BROWN, ANDREW
MARTIN, GREGORY TARVER,
BOBBY JOHNSON,
ECOTRY FULLER

JUROR QUESTIONNAIRE

In order to speed up the process of jury selection, a juror questionnaire has been prepared for you to complete. These questions should be answered by you and returned to the Clerk of the United States District Court for the Middle District of Louisiana in the enclosed envelope. **A response is required by December 17, 1999.** Do *not* place your name, address or place of employment anywhere on this questionnaire. Your name, address or place of employment should only be placed on the cover sheet attached to the questionnaire. Please place your signature on the cover sheet. Your answers will have the effect of a statement made under oath.

The questionnaire is designed to obtain information about your background as it relates to your possible service as a juror in this case. Its use will avoid the necessity of asking each prospective juror every one of these questions in open court, thereby substantially shortening the jury selection process.

All information contained in this questionnaire will be kept confidential. It will be reviewed only by the Court and by the attorneys on each side. Neither your identities nor your answers will be released to the general public or the media. You will be identified at trial only by your juror number.

Respond to each question as fully and completely as possible. Your complete candor and honesty is necessary so that both the prosecution and the defense will have a meaningful opportunity to select an appropriate jury. Your cooperation is of vital importance.

Because the questionnaire is part of the jury selection process, the questionnaires are to be answered under your oath as a prospective juror to tell the truth. You are instructed not to discuss this case or the questionnaire with anyone, including your family, friends, co-workers and fellow jurors. **You must complete the questionnaire yourself without consulting, talking to or seeking assistance from anyone.**

If you require additional space for your response or wish to make further comments regarding any of your answers, please use the additional blank pages attached to the back of your questionnaire. Please identify by number the question you are responding to on the blank page.

Please keep in mind that there are no "right" or "wrong" answers. Your answers will assist the Court and the parties in selecting an appropriate jury.

Please fill out the entire questionnaire. Do not leave any questions blank. If you are unable to answer a question or do

not understand the question, please answer "do not know" or "do not understand" in the space after the question.

PLEASE WRITE OR PRINT LEGIBLY. IF YOUR ANSWERS ARE ILLEGIBLE, YOU WILL BE REQUIRED TO RE-COPY YOUR ANSWERS.

Thank you for your full cooperation. It is of vital importance to the Court that you return your completed questionnaire by *DECEMBER 17, 1999.*

1. Age: _____

2. Gender: ____Male ____Female

3. What is your race?
   ____ White
   ____ Hispanic/Latino
   ____ Black/African-American
   ____ Asian
   ____ Native American
   Other: _____

4. Do you have any difficulty reading, speaking, or understanding the English language?
   Yes ____ No ____

5. Do you speak or understand any languages in addition to English?
   ____ Yes What language(s): _____
   ____ No

6. Do you have:

Any difficulty hearing	Yes ___	No ___
Any difficulty seeing	Yes ___	No ___
Primary responsibility for a young child, a disabled or elderly relative	Yes ___	No ___

Regular doctor's appointments for a chronic health program Yes ___ No ___
IF YES, please briefly explain: _____

7. Are you taking any medication on a regular basis? Yes ___ No ___
IF YES, which ones: _____

Please answer the following questions even if the Court has previously denied your request to be excused for hardship reasons. The Court will reconsider any request to be excused for hardship reasons.

8. The Court estimates that the trial of this case may last 2-3 months. Do you have any personal problems or medical condition(s) which could affect your ability to serve as a juror in a trial of this length?
Yes ___ No ___
IF YES, please state the nature of the problem(s): _____
_____
_____
_____

9. Jury service is one of the highest duties and privileges of a citizen of the United States. Mere inconvenience or the usual financial hardships of jury service will be insufficient to excuse a prospective juror. Jurors are paid $40.00 per day plus mileage expenses. Do you wish to apply to the Court to be excused on the ground that jury service would be a serious hardship?
Yes ___ No ___
IF YES, please briefly explain the hardship: _____
_____
_____

10. Is there anything else of a personal or professional nature that might make it difficult for you to concentrate on this trial?

Yes ___ No ___

IF YES, please explain: _____

Residential History

11. City of residence: _____ Zip Code: _____

12. Do you: (check one)
    - ____ Own your home
    - ____ Rent your home
    - ____ Live with other homeowners
    - ____ Live with relatives, if so state relationship: _____

13. How long have you lived in Louisiana? _____ years
    Where else have you lived in Louisiana, and how long did you live there?

    _____

    _____

14. Please list the places outside Louisiana where you have lived and how long you have lived there:

    _____

    _____

15. Where were you born? _____

Background/Family History

In answering questions 16-31 do not give the name or address of any employer or employer's business. If a question asks about an occupation, only provide a general

description about the nature of that occupation. (For example: construction, A/C, plumbing, government, etc.)

16. Marital status: (check one)
    - ____ Single (never married)
    - ____ Living with a partner for ____ years
    - ____ Married for ____years
    - ____ Separated for ____years; married for ____ years
    - ____ Divorced for ____years; married for ____ years
    - ____ Widowed for ____years; married for ____ years

17. If you have children, stepchildren or grandchildren, please list: (do *NOT* list names)

Relationship	Age	Education	Occupation	Does he/she live with you?

Employment

18. Current employment status (check **any and all** that apply):
    - ____ Self-employed
    - ____ Work full-time
    - ____ Work part-time
    - ____ Homemaker for ____ years
    - ____ Student for ____ years
    - ____ Disabled and unable to work for ____ years or ___ months
    - ____ Unemployed/laid off for ____ years or ____ months
    - ____ Retired for ____ years
    - ____ Other: _____

19. What is or was your occupation? (If you are retired, unemployed, homemaker, or disabled, what was your last job?) Do *NOT* list name of employer or name of employer's business.

_____

20. What are (were) your main responsibilities on your most recent job?

_____

_____

_____

21. Please state the nature of your current or last employer's business (e.g. construction, A/C, plumbing, government, etc.) Do *NOT* list name of employer or name of employer's business.

_____

22. Length of employment at current or last job: ____ (years) (months)

23. Do you work for a:

____ Small company (Less than 50 employees)
____ Large company (50 employees or more)
____ Self-employed Company name: _____
____ Government agency—Specify: _____
____ Other: _____

24. How satisfied are you with your current work situation?

____ Very satisfied
____ Somewhat satisfied
____ Somewhat dissatisfied
____ Very dissatisfied
____ Not working

25. Have you ever been laid off? Yes ___ No ___
IF YES, please explain: _____
_____

26. Do you supervise other people? Yes ___ No ___
If yes, how many? _____
Did you hire/fire others? Yes ___ No ___
Describe your responsibilities: _____
_____

27. Whether or not you are currently employed, please complete the following information for **previous** jobs and employers: (Do *NOT* include current job and Do *NOT* list name of employer or name of employer's business.)
Job Title or Kind of Work Length
_____
_____
_____
_____

28. Have you or anyone in your family ever had **training** or **employment** in the following:

Federal government	Yes ___	No ___
Internal Revenue Service	Yes ___	No ___
State government or legislature	Yes ___	No ___
Local government	Yes ___	No ___
Law enforcement (local, state, or federal)	Yes ___	No ___
Court system (local, state, or federal)	Yes ___	No ___
Law or law office	Yes ___	No ___
Gaming industry	Yes ___	No ___

IF YES TO ANY OF THE ABOVE, please explain whether this is yourself or a relative, courses or job(s) held, and dates of employment:D
_____

_____

_____

29. Have you taken any courses or had training in business, finance, or accounting?

Yes ___ No ___

Please explain: _____

30. Have you ever owned or invested in a business?

Yes ___ No ___

a. Are you still operating the business?

Yes ___ No ___

IF NO, why not? _____

_____

b. Please describe the business but do not give the name:

_____

_____

c. Was this experience: (check one) ____ positive
____ negative ____ mixed
Please explain: _____

_____

31. Have you or your employer ever done business or sought to do business with any state government agency?

Yes ___ No ___

IF YES, please explain: _____

_____

_____

a. Were you or your employer treated fairly by the state agency?

Yes ___ No ___

b. Was this experience: (check one) ____ positive
____ negative ____ mixed
Please explain: _____

_____

Education

32. What is the highest grade or degree you completed in school? _____

If more than high school, please fill in below:

Dates Area(s) of study/training Degree/Certificate

_____

_____

33. When you were in school, what was your:

Favorite Subject Least Favorite Subject

_____ _____

_____ _____

Military

34. Have you ever been in the military?

Yes ___ No ___

IF YES, which branch? What was your rank and dates of service, and what type of discharge did you receive?

_____

_____

If you served in the military, please describe the types of jobs you had, any special training, including law enforcement or military courts, and the types of skills you acquired.

_____

_____

Your Spouse or Partner's Background

Please complete all of the following questions regarding your present spouse or non-married partner. If you are widowed, divorced, or separated, please complete all the following questions regarding your former spouse or partner.

35. What is your spouse's or partner's age? _____

36. Spouse or partner's current employment status (check **any and all** that apply):
    - ____ Self-employed
    - ____ Work full-time
    - ____ Work part-time
    - ____ Homemaker for _____ years
    - ____ Student for _____ years
    - ____ Disabled and unable to work for _____ years or _____ months
    - ____ Unemployed for **[sic]** years ____ or months ____
    - ____ Retired for _____ years
    - ____ Other: _____

37. What is or was your spouse or partner's occupation? (If he/she is retired, unemployed, homemaker, or disabled, what was their last job?) Do *NOT* list name of employer or name of employer's business.

    _____

38. What are (or were) your spouse or partner's duties and responsibilities: _____

    _____

39. List the nature of your spouse or partner's current or last employer(s)' business (e.g., construction, plumbing, government, etc.). Do *NOT* list name of employer or name of employer's business.

    _____

    _____

40. Length of **spouse/partner's** employment at current or last job: _____ years

41. What other types of work has he/she done? _____

    _____

42. Was your spouse/partner ever laid off? Yes___ No ___
IF YES, please explain: _____

_____

43. What is the last grade or degree your spouse or partner completed in school?

_____

If more than high school, please fill in below:
Dates Area(s) of study/training Degree/Certificate

_____

_____

Activities

44. Have you ever done any volunteer work?
Yes ___ No ___
IF YES, please describe: _____

_____

45. Have you or your family been involved in any organizations, such as educational, religious, professional or political groups?
Yes ___ No ___
IF YES, please explain: _____

_____

46. Have you or has your spouse/partner ever belonged to a union?
Yes ___ No ___
IF YES, who: Self__ Spouse/Partner_____
Dates of Membership: Self__ to __ Spouse/Partner__ to__

47. Have you ever held a leadership position in any organization?

Yes ___ No ___

IF YES, please list the leadership positions you have held: _____

_____

48. In terms of political party affiliations, are you a:

____ Democrat
____ Republican
____ Independent
____ Libertarian
____ Other: _____
____ None

49. Do you consider yourself to be politically:

____ Extremely Liberal
____ Liberal
____ Moderate
____ Conservative
____ Extremely Conservative
____ None of the above

50. Have you, or anyone close to you, ever run for, been appointed or been elected to serve in any public office or governing board, such as a school board or police jury?

Yes ___ No ___

IF YES, please explain: _____

_____

51. Have you ever given a gift to a public official or contributed money or made a loan to a political candidate or campaign?

Yes ___ No ___

IF YES, please explain: _____

_____

52. Have you ever worked in the field of politics or donated your time to work on the campaign of a political candidate?

Yes ___ No ___

IF YES, please explain: _____

_____

53. How closely would you say you follow Louisiana state politics?

____ Follow very closely
____ Follow somewhat closely
____ Follow rarely
____ Do not follow at all

54. What is your religion?

____ No preference
____ Baptist
____ Protestant
____ Catholic
____ Jewish
____ Other: _____

55. Approximately how often do you attend church or religious services?

____ Never
____ Rarely
____ Several times a year
____ Once a month
____ Several times a month
____ Once a week
____ Several times a week

56. Is there anything in your religion or personal beliefs which would prevent you from sitting as a juror, in judgment of the guilt or innocence of another person, or following the law given to you by the Court?

Yes ___ No ___

Gambling

57. How do you feel generally about legalized gambling in Louisiana?
    ____ Approve
    ____ Disapprove
    ____ No opinion

58. Does your church or religious organization have a position on gambling?
    ____ Yes, it is against gambling.
    ____ Yes, it is **not** against gambling.
    ____ No, my church has no opinion on gambling.
    ____ Don't know.
    ____ Not applicable.
    IF YES, do **you** agree with your church's position?
    Yes ___ No ___

59. Do you have any moral or personal opposition to legalized gambling?
    Yes ___ No ___
    IF YES, please explain: _____
    _____

60. Do or did you support the campaign to reform or repeal the state gambling laws?
    Yes ___ No ___

61. Are you specifically opposed to any of the following:
    Riverboat gambling Yes ___ No ___
    Casino gambling Yes ___ No ___
    Video poker Yes ___ No ___

62. Have you or has anyone close to you ever had an interest in or investment with any companies or person involved in the ownership of gaming operations?

Yes ___ No ___

IF YES, please describe: _____

_____

63. Do you know anyone who has had any contact with the Louisiana State Police Riverboat Gaming Division?

Yes ___ No ___

IF YES, please explain: _____

_____

_____

64. Do you know anyone who now works or has worked in the gaming industry?

Yes ___ No ___

IF YES, please explain in what job(s), when, and where he/she is employed:

_____

_____

65. Have you read, seen, or heard any news reports regarding regulation of the gaming industry in Louisiana?

Yes ___ No ___

IF YES, what have you read, seen, or heard? _____

_____

66. Do you believe that the citizens of Louisiana should have more influence over how gambling is regulated in the state?

____ Agree strongly
____ Agree somewhat
____ Disagree somewhat
____ Disagree strongly
____ No opinion

67. Do you believe that a person who is connected with the gaming industry is more likely to violate the law than one who is not connected with the legalized gambling industry?
    ____ Agree strongly
    ____ Agree somewhat
    ____ Disagree somewhat
    ____ Disagree strongly
    ____ No opinion

68. Do you believe that the gaming industry is necessary to Louisiana's economy?
    ____ Agree strongly
    ____ Agree somewhat
    ____ Disagree somewhat
    ____ Disagree strongly
    ____ No opinion

69. Do you believe there has been corruption in the awarding of Louisiana riverboat gaming licenses?
    ____ Agree strongly
    ____ Agree somewhat
    ____ Disagree somewhat
    ____ Disagree strongly
    ____ No opinion

70. Do you believe former Governor Edwards is responsible for previous or current problems in the state's gaming industry?
    ____ Agree strongly
    ____ Agree somewhat
    ____ Disagree somewhat
    ____ Disagree strongly
    ____ No opinion

71. Do you believe that anyone who deals in large sums of cash is probably engaged in criminal activity?
    ____ Agree strongly
    ____ Agree somewhat
    ____ Disagree somewhat
    ____ Disagree strongly
    ____ No opinion

Jury Service/Experience and Opinions about the Court System

72. Have you ever served on a jury? Yes ___ No ___
    IF YES, please complete the following for each case on which you served:

Civil or Criminal	Charges or Allegations	When	Where

Was a verdict reached? If no, why not?	Verdict	Were you the Foreperson?

73. Do you believe everyone should be treated equally under the law?
    ____ Agree strongly
    ____ Agree somewhat
    ____ Disagree somewhat
    ____ Disagree strongly

74. Do you believe the police are very thorough and accurate in their usual investigations?
    ____ Agree strongly
    ____ Agree somewhat
    ____ Disagree somewhat
    ____ Disagree strongly

75. Have you or your family been the victim of wrongdoing by others (whether or not criminal charges were filed)?

Yes ___ No ___

IF YES, please describe: _____

_____

_____

_____

76. Have you ever testified as a witness in a trial?

Yes ___ No ___

Please explain: _____

_____

77. Have you or has a family member ever been involved in a lawsuit or legal action of any kind?

Yes ___ No ___

Please explain: _____

_____

78. Have you ever accused someone or been accused of dishonest practices or activities?

Yes ___ No ___

IF YES, please explain: _____

_____

_____

79. Do you know anyone (including an employer) who has been charged or convicted of a crime or been involved in a criminal investigation?

Yes ___ No ___

IF YES, please explain: _____

_____

_____

80. Have you or anyone close to you ever been treated unfairly by any branch of government?

Yes ___ No ___

IF YES, please identify the government agency and explain what happened.

_____

_____

81. Have you or has a close family member or friend ever served time in jail or prison?

Yes ___ No ___

a. Please explain who, when, how long, and the nature of the charge(s):

_____

_____

_____

b. Did you or that person apply for a pardon?

Yes ___ No ___

Please explain who applied, when, and the outcome: ____

_____

82. Do you know anyone who agreed to cooperate with the prosecution in a criminal case in order to get a reduced sentence or immunity?

Yes ___ No ___

IF YES, please explain: _____

_____

83. Some of the government's witnesses in this case are testifying as part of plea bargaining agreements or under a grant of immunity from prosecution. What is your opinion about the use of plea agreements or granting immunity for this purpose?

____ Approve

____ Disapprove

____ No opinion

Please explain your answer: _____

_____

84. What is your opinion regarding law enforcement's use of Court authorized telephone wire taps in conducting an investigation?

____ Approve
____ Disapprove
____ No opinion

Please explain your answer: _____

_____

85. What is your opinion regarding law enforcement's use of informants in gathering information relating to possible criminal violations of the law?

____ Approve
____ Disapprove
____ No opinion

Please explain your answer: _____

_____

Connections with Parties to this Case

86. Do you or does anyone close to you know or have any connection with any of the prosecutors in the case: Eddie Jordan, Jr., Jim Letten, Michael Magner, Peter Strasser, Fred Harper, or Todd Greenberg?

Yes ___ No ___

IF YES, what is the connection and whom is it between?

_____

_____

_____

87. Have you or has anyone close to you had any contact with Judge Polozola or his staff?

Yes ___ No ___

IF YES, please explain: _____

_____

88. Do you know anyone who is or was associated with any of the United States Attorney's offices in Louisiana, the U.S. Department of Justice, or the F.B.I.?

Yes ___ No ___

IF YES, what was the association and what is your relationship? _____

_____

_____

89. Do you or does anyone close to you know or have any connection with any of the following defense lawyers: Dan Small, Jim Cole, Pat Fanning, Sonny Garcia, Mary Olive Pierson, Hillar Moore, Rebecca Hudsmith, Craig Smith, William Jeffress, James Heavner, Ernest Johnson?

Yes ___ No ___

IF YES, what is the connection and whom is it between?

_____

_____

_____

90. Do you or does anyone close to you know or have any connection with any of the defendants in this case: former Governor Edwin Edwards, Stephen Edwards, Cecil Brown, Senator Greg Tarver, Andrew Martin, Bobby Johnson or Ecotry Fuller?

Yes ___ No ___

IF YES, what is the connection and whom is it between?

_____

_____

_____

91. Former Governor Edwin Edwards was previously tried and found not guilty of federal charges in 1986 in a

separate case. Would your opinion of the verdict (in the prior case) make it difficult for you to sit as a fair and impartial juror in this case?

Yes ___ No___ Not sure ___

IF YES OR NOT SURE, please explain: _____

_____

92. Would your current opinion about former Governor Edwards make it difficult for you to be a fair and impartial juror in this case?

Yes ___ No___ Not sure ___

93. Do you think former state officials (no longer in office) should be allowed to provide services to companies doing business with, or regulated by, the state?

Yes ___ No ___

94. Do you think that a **current** state official's family members should be allowed to provide services to companies doing business with or regulated by the state?

Yes ___ No ___

Media

95. Do you read a daily newspaper?

Yes ___ No ___

Which one(s)? _____

96. What other magazines and newspapers do you read on a regular basis?

_____

97. What radio and television programs do you enjoy?

TV: _____

Radio: _____

98. Have you followed news accounts of any trials in the news?

Yes ___ No ___

IF YES, please explain: _____

_____

99. Do you or have you ever had a bumper sticker on your car?

Yes ___ No ___

IF YES, what does or did it say? _____

_____

Pretrial Publicity

Because this case has received publicity, you have probably seen, read, or heard something about this case either in the media or from friends, relatives, or co-workers. It is important that you carefully and completely answer the following questions concerning what you have learned about the case. There are no right or wrong answers. Please be as candid as possible.

100. a. Briefly tell what information you have read, seen, or heard about the case, the defendants, or their attorneys:

_____

_____

_____

_____

_____

_____

b. What have you read, seen, or heard about the government's investigation, the federal prosecutors, or government witnesses?

_____

_____

_____
_____
_____
_____

101. From which source(s) have you heard, read, or seen anything about this case? (Check **any and all** that apply)

____ TV news
____ Radio
____ Newspapers
____ Magazines
____ Internet
____ Word of mouth
Other: _____

102. Approximately how many media (television, newspaper, magazine, and radio) reports in total have you seen, read, or heard about this case?

____ None
____ 1 - 5
____ 6 - 10
____ 11 - 20
____ 21 - 30
____ 31 - 50
____ 51 - 75
____ 75 - 100
____ 101 - 200
____ More than 200

103. Have you heard others express opinions about this case or about any of the defendants?

Yes ___ No ___

IF YES, what opinions were expressed? _____
_____
_____

_____

_____

104. Have you personally met or do you have any knowledge of anyone associated with this case?

Yes ___ No ___

IF YES, please list who they are and how you know them: _____

_____

_____

_____

105. Have you formed any opinion about the case or about any of the defendants?

Yes ___ No ___

IF YES, (a) what is your opinion? _____

_____

_____

(b) would you be able to set aside your current opinion and base your verdict on the law and evidence in this case? _____

_____

106. Every defendant is presumed innocent and cannot be convicted unless the jury, based solely on all the evidence in this case, unanimously decides that his guilt has been proven beyond a reasonable doubt. The burden of proving guilt rests entirely with the government. The defendants have no burden of proof at all. Would you have any difficulty following these rules?

Yes ___ No ___

107. If, as a juror, you determine that the government has proven a defendant guilty of a charged offense beyond a reasonable doubt, would you be able to vote in favor of a guilty verdict?

Yes ___ No ___

108. Conversely, if, as a juror, you believe that the government has failed to carry its burden of proving a defendant guilty of a charged offense beyond a reasonable doubt, would you be able to vote for a verdict of not guilty?

Yes ___ No ___

109. Do you believe that a defendant in a criminal trial should be required to testify?

____ Agree

____ Disagree

IF AGREE: the judge will instruct you that:

a. a defendant in a criminal trial has no obligation to testify;

b. jurors cannot draw any conclusion from the fact that a defendant chooses not to testify; and

c. that the fact that a defendant chooses not to testify cannot be a factor in reaching your verdict.

Would you have any problem following those instructions if a defendant chooses not to testify?

Yes ___ No ___

IF YES, please explain: _____

_____

110. Would you be more likely to believe a law enforcement officer or other government agent than any other witness?

Yes ___ No___ Treat all the same___

111. You as a juror must follow the law as given to you by the Judge whether you agree with it or not. Would you have any difficulty following this rule?

Yes ___ No ___

112. The indictment in this case is an accusation and not evidence of guilt. Would you have any difficulty treating the indictment as an accusation and not as evidence of guilt?

Yes ___ No ___

113. There are seven defendants in this case. Each defendant and each charge must be considered separately. You cannot find a defendant guilty on any count unless the government has proven his guilt on that count beyond a reasonable doubt. You must not draw any conclusion from the fact that the defendants are on trial together, and you must not find one defendant guilty by reason of your finding another defendant guilty. Would you have difficulty following these rules?

Yes ___ No ___

114. Do you know of any reason why you could not fairly and impartially decide in accordance with your oath and based solely on the law and evidence, whether the government has proved a defendant's guilt beyond a reasonable doubt?

Yes ___ No ___

IF YES, what is the reason? _____

_____

Conclusion

115. Is there any matter not covered by this questionnaire that you think the attorneys or court might want to know about when considering you as a juror in this case?

Yes ___ No ___

Please explain: _____

_____

_____

_____

116. Is there any matter not covered by this questionnaire that may affect your ability to reach a fair and impartial verdict?

Yes ___ No ___

IF YES, please explain: _____

_____

_____

_____

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	**CRIMINAL ACTION NUMBER 98-165-B**
	*	
VERSUS	*	
	*	
EDWIN EDWARDS	*	**MAY 5, 2000**
STEPHEN EDWARDS	*	
CECIL BROWN	*	
ANDREW MARTIN	*	**HONORABLE**
BOBBY JOHNSON	*	**FRANK J.**
GREGORY TARVER	*	**POLOZOLA**
ECOTRY FULLER	*	**CHIEF JUDGE**

TRANSCRIPT OF THE TRIAL IN THE ABOVE ENTITLED AND NUMBERED CRIMINAL ACTION.

APPEARANCES:

ASSISTANT U.S. ATTORNEYS
JAMES B. LETTEN
MICHAEL W. MAGNER
FRED HARPER

ATTORNEYS FOR THE DEFENDANTS
DANIEL SMALL
JAMES COLE
REBECCA HUDSMITH
SERVANDO C. GARCIA, III
MARY OLIVE PIERSON
HILLAR C. MOOR, III
ERNEST JOHNSON

PATRICK FANNING
CRAIG SMITH

REPORTED BY:

BARBARA DAVIS PHIPPS, C.C.R.
OFFICIAL COURT REPORTER
UNITED STATES COURTHOUSE
777 FLORIDA STREET
BATON ROUGH, LA 70801

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER WORK PERFECT SOFTWARE AND STORED IN ASCII FORMAT.

10:35A.M. (OPEN COURT.) MAY 5, 2000

THE COURT: THE COURT WILL NOW ASSIGN SOME PUBLIC REASONS FOR THE COURT'S DECISION TO REMOVE THE JUROR, NUMBER 68.

THE COURT WILL THEREAFTER ASSIGN EVEN MORE DETAILED REASONS UNDER SEAL WHICH THE COURT BELIEVES IT HAS AN OBLIGATION TO DO. AND WE WILL JUST — WHEN I FINISH THE PUBLIC PART, I WILL JUST GO RIGHT INTO THE PRIVATE PART.

YESTERDAY THE COURT RULED THAT UNDER RULE 23 OF THE FEDERAL RULES OF THE CRIMINAL PROCEDURE THERE WAS JUST CAUSE TO REMOVE 68 AS A MEMBER OF THE JURY IN THIS PARTICULAR CASE. THE COURT BELIEVES IT IS IMPORTANT IN FAIRNESS TO THE JUROR AS WELL AS MAKING SURE THE RECORD IS CLEAR THAT

THE COURT SET FORTH SOME BACKGROUND IN REGARD TO THIS PARTICULAR JUROR AND SOME INQUIRIES THAT HAVE BEEN MADE INSOFAR AS HE IS CONCERNED.

THERE WERE TWO SEPARATE MATTERS INQUIRED INTO BY THE COURT. DURING THE TIME THAT THE COURT WAS ENGAGED IN THE TRIAL OF THIS CASE, THE COURT RECEIVED TWO CALLS FROM CITIZENS. IRONICALLY AS MOST THINGS ARE IN THIS PARTICULAR CASE, ON THE VERY SAME DAY AS COURT RECEIVED THE CALLS ABOUT THIS JUROR, THE COURT ALSO RECEIVED CALLS ABOUT JUROR 350 FROM OTHER PEOPLE. AND AS THE RECORD WILL REFLECT, JUROR 350 FROM EXCUSED AS A MEMBER OF THE JURY. THE TWO CALLS OR SETS OF CALLS WERE NOT RELATED.

THE COURT INITIALLY HAD THE MARSHAL INVESTIGATE THE MATTER INVOLVING THIS PARTICULAR JUROR AS WELL AS THE OTHER JUROR. AFTER THE MARSHAL HAD INITIALLY INVESTIGATED THE MATTER, ANOTHER CALL WAS RECEIVED AT THE OFFICE OF STEPHEN EDWARDS REGARDING THE JUROR, A CALL WHICH INDICATED BIAS AGAINST EDWIN W. EDWARDS. THE COURT AGAIN INVESTIGATED THE MATTER BUT AT THAT TIME DID NOT CALL ANY WITNESSES. THE COURT AND THE PARTIES AGREED AT THAT TIME THAT THE INVESTIGATION WAS SUCH THAT THE JUROR SHOULD NOT BE EXCUSED. PRIOR TO ALL OF THE CURRENT MATTERS BEING INQUIRED INTO AND MORE SPECIFICALLY PRIOR TO THE TIME THE COURT RECEIVED THE NOTE FROM THE JURY, THE COURT

HAD ADVISED THE PARTIES THAT IT WOULD INDEED CALL THE WITNESSES IN CONNECTION WITH THIS MATTER TO MAKE SURE THAT THE RECORD WAS COMPLETE. AND THE REASON THE COURT WAS GOING TO DO SO WAS BECAUSE OF A 5TH CIRCUIT OPINION IN PAZ IN WHICH THE 5TH CIRCUIT COURT OF APPEALS REVERSED THE JUDGE FOR NOT CONDUCTING AN INQUIRY TO DETERMINE WHETHER OR NOT THE INFORMATION THAT WAS INVOLVED IN THAT CASE, NAMELY SOME BOOKS, HAD ANY REASONABLE POSSIBILITY OF AFFECTING THAT VERDICT. SO THE COURT DID NOT WANT TO CHANCE ANYTHING INSOFAR AS THOSE ALLEGATIONS WHERE CONCERNED.

FOLLOWING THE DISCLOSURE THAT THIS JUROR HAD BROUGHT A DICTIONARY AND A THESAURUS INTO THE JURY DELIBERATION ROOM, THE COURT RECEIVED A MOTION FROM THE GOVERNMENT TO HAVE THE JUROR REMOVED. THEREAFTER, THE COURT RECEIVED THE NOTE FROM THE JURY.

WHEN THE COURT BEGAN ITS INQUIRY INTO THIS MATTER, THE COURT ADVISED THE PARTIES THAT IT WOULD NOT ONLY CONDUCT AN INQUIRY INTO THE JURY'S NOTE, BUT THE COURT ALSO FELT OBLIGATED TO NOW HAVE THE WITNESSES WHO HAD FILED SOME COMPLAINTS AGAINST THIS JUROR TO BE PLACED UNDER OATH AND A HEARING WOULD BE CONDUCTED AS THE COURT CONDUCTED FOR JUROR 350.

THE COURT HAS AN OBLIGATION AND INDEED A DUTY TO INVESTIGATE MATTERS PERTAINING TO JURY CONDUCT. IN A RECENT

CASE DECIDED BY THE 2ND CIRCUIT COURT OF APPEALS IN UNITED STATES VERSUS THOMAS THE COURT, IN FACT, STATED THAT, "IT WOULD BE A DERELICTION OF DUTY FOR A JUDGE TO REMAIN INDIFFERENT TO REPORTS THAT A JUROR IS INTENT ON VIOLATING HIS OATH. A FEDERAL JUDGE WHOSE OWN OATH OF OFFICE REQUIRES THE JUDGE TO FAITHFULLY AND IMPARTIALLY DISCHARGE AND PERFORM ALL OF THE DUTIES INCUMBENT UPON THE JUDGE UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES 28 USC SECTION 453 MAY NOT IGNORE COLORABLE CLAIMS THAT A JUROR IS ACTING ON THE BASIS OF SUCH IMPROPER CONSIDERATIONS."

THE CIRCUIT COURT CONTINUED, "SO ALSO A PRESIDING JUDGE POSSESSES BOTH THE RESPONSIBILITY AND THE AUTHORITY TO DISMISS A JUROR WHOSE REFUSAL OR UNWILLINGNESS TO FOLLOW THE APPLICABLE LAW BECOMES KNOWN TO THE JUDGE DURING THE COURSE OF THE TRIAL."

RULE 24 (C) -- AND I THINK I STARTED OFF BY SAYING RULE 23. IF I DID, IT SHOULD HAVE BEEN RULE 24, RULE 24 (C) OF FEDERAL RULES OF CRIMINAL PROCEDURE PROVIDES FOR THE SUBSTITUTION OF ALTERNATES. IN THIS CASE THE COURT DID NOT HAVE TO SUBSTITUTE ALTERNATES BECAUSE UNDER RULE 23 -- AND I WAS CORRECT INITIALLY -- UNDER RULE 23, A VALID VERDICT MAY BE RETURNED BY A JURY OF LESS THAN 12 SHOULD THE COURT FIND IT NECESSARY TO EXCUSE ONE OR MORE JURORS FOR ANY JUST CAUSE AFTER TRIAL COMMENCES EVEN ABSENT SUCH STIPULATION IF THE COURT

FINDS IT NECESSARY TO EXCUSE A JUROR, FOR JUST CAUSE AFTER THE JURY HAS RETIRED TO CONSIDER ITS VERDICT, IN THE DISCRETION OF COURT A VALID VERDICT MAY BE RETURNED BY THE REMAINING 11 JURORS. THE PROCEDURE FOLLOWED BY THE COURT IN THIS CASE WAS ALMOST IDENTICAL TO THE PROCEDURE FOLLOWED BY THE COURT IN THE INVESTIGATION OF OTHER JURY MATTERS PARTICULARLY THAT OF JUROR 350, WITH THE EXCEPTION THAT IS GOING TO BE NOTED. THE COURT CONDUCTED THE HEARING ON THE JURY NOTE FIRST WHICH REQUIRED THE COURT TO INTERVIEW ALL JURORS, A PROCEDURE WHICH HAS BEEN DONE IN NUMEROUS CASES AND IS SANCTIONED BY THE CIRCUIT COURTS, INCLUDING THE 5TH CIRCUIT COURT OF APPEALS. IN FACT THE COURT FOLLOWED THE PROCEDURES RECOMMENDED BY THE 5TH CIRCUIT IN UNITED STATES VERSUS SHARP REPORTED AT 193 F.3D 852 WHEREIN THE COURT NOTED THAT JUDGE PICKERING WHEN HE WAS QUESTIONING THE JURORS IN HIS ATTEMPT TO MAKE SURE THAT HIS QUESTIONING OF THE JURORS DID NOT IN ANY WAY IMPACT THE DELIBERATIVE PROCESS, FIRST REMINDED THE JURORS -- AND THIS IS WHAT THE CIRCUIT COURT SAYS -- FIRST REMINDED THE JURORS THAT THEY WERE THE ULTIMATE JUDGES OF THE FACTS AND THAT THEY SHOULD NOT BE INFLUENCED BY ANYTHING THAT HE SAID OR DID. HE ALSO WARNED THE JURORS NOT TO REVEAL THE DETAILS OF THE DELIBERATIVE PROCESS IN THEIR RESPONSES.

THIS COURT USED ALMOST IDENTICAL LANGUAGE AS A PREFACE BEFORE TALKING TO

EACH OF THE JURORS IN THIS CASE. AND, IN ADDITION, THE COURT GOT INPUT FROM COUNSEL AND AGREED ON A SPECIFIC SET OF QUESTIONS TO BE ASKED. THERE WERE ALSO BREAKS AS AGREED TO BY THE COURT AND COUNSEL TO ALLOW COUNSEL TO HEAR THE STATEMENTS OF EACH JUROR BECAUSE THE JURORS WERE INTERVIEWED PRIVATELY BY THE COURT WITH THE COURT REPORTER PRESENT TO AVOID ANY PRESSURE OR PREJUDICE TO EACH OF THE JURORS. SUCH A PROCEDURE WAS ALSO APPROVED BY THE 5TH CIRCUIT IN THE SHARP CASE. AND AS THE COURT DID IN THE SHARP CASE THIS COURT ALSO GAVE THOUGHTFUL CONSIDERATION TO THE SUGGESTIONS OF COUNSEL. EXCEPT TO ACCOMMODATE ONE JUROR FOR MEDICAL REASONS, EACH OF THE JURORS WERE INTERVIEWED IN THE ORDER IN WHICH THEY SAT IN THE JURY BOX. EACH JUROR WAS ALSO READ PAGES 92 TO 93 OF THE COURT'S JURY CHARGE AND IN PARTICULAR THE FOLLOWING PASSAGE WHICH INDICATED, "IT IS YOUR DUTY TO CONSULT WITH ONE ANOTHER AND TO DELIBERATE IN AN EFFORT TO REACH AGREEMENT IF YOU CAN DO SO. EACH OF YOU MUST DECIDE THE CASE FOR YOURSELF BUT ONLY AFTER AN IMPARTIAL CONSIDERATION OF THE EVIDENCE WITH YOUR FELLOW JURORS. DURING YOUR DELIBERATIONS DO NOT HESITATE TO REEXAMINE YOUR OWN OPINIONS AND CHANGE YOUR MIND IF CONVINCED THAT YOU WERE WRONG, BUT DO NOT GIVE UP YOUR HONEST BELIEFS AS TO THE WEIGHT OR EFFECT OF THE EVIDENCE SOLELY BECAUSE OF THE OPINION OF YOUR FELLOW JURORS OR FOR THE MERE PURPOSE OF RETURNING A VERDICT."

THE COURT COMPLETED ITS EVALUATION OF THE STATEMENTS OF EACH OF THE JURORS. AFTER THE COURT HAD COMPLETED THIS INQUIRY, THE SECOND INQUIRY BEGAN, AND WITNESSES WERE CALLED INCLUDING TWO OF THE INDIVIDUALS WHO HAD INITIALLY FILED THE COMPLAINT WITH THE COURT REGARDING JUROR 68.

OTHER WITNESSES WERE ALSO CALLED. NO ONE WAS CALLED AS A WITNESS IN THIS INQUIRY WHO WAS ASSOCIATED WITH THIS CASE. NEITHER THE GOVERNMENT LAWYERS OR AGENTS WERE CALLED AS WITNESSES; NEITHER THE DEFENSE COUNSEL NOR DEFENDANTS OR ANYBODY ASSOCIATED WITH EITHER OF THESE INDIVIDUALS INCLUDING THE GOVERNMENT WERE CALLED AS WITNESSES. A UNITED STATES MARSHAL DID GIVE A SUMMARY OF HIS INVESTIGATION.

AFTER HEARING ALL OF THE EVIDENCE IN THIS SECOND INQUIRY, THE COURT CONCLUDED THAT THE COMPLAINTS MADE BY THESE OUTSIDE INDIVIDUALS DID NOT JUSTIFY OR WARRANT THE REMOVAL OF A JUROR BASED ON THE INFORMATION GIVEN TO THE COURT.

THIS COURT WILL ALSO STATE PUBLICLY THAT JUROR 68'S RELIGION OR RELIGIOUS BELIEFS WERE NOT AND ARE NOT THE CAUSE OF HIS REMOVAL AS A JUROR IN THIS CASE.

THIS COURT WILL STATE PUBLICLY THAT THE JUROR'S OPINIONS ON THE EVIDENCE OR ON THE GUILT OR INNOCENCE OF ANY DEFENDANT IN THIS CASE WHICH INCIDENTALLY THE COURT DID NOT INQUIRE INTO INSOFAR AS HIS ACTUAL VOTE

WAS NOT AND IS NOT THE BASIS FOR HIS REMOVAL IN THIS CASE.

THE BASIS OF THE COURT'S REMOVAL WHICH WILL BE SPELLED OUT IN MORE DETAIL IN THE COURT'S PRIVATE OPINION WAS BASED SOLELY ON INFORMATION OBTAINED FROM THE JURY INQUIRY. AND BASED ON THAT INFORMATION THE COURT HAS CONCLUDED THAT THE COURT'S DECISION TO REMOVE THE JUROR -- AND THIS IS GOING TO BE A BROAD UMBRELLA STATEMENT -- THE COURT'S CONCLUSION FOR REMOVING THE JUROR IS FOR HIS FAILURE OR REFUSAL TO FOLLOW THE COURT'S INSTRUCTIONS IN THIS PARTICULAR CASE.

MUCH HAS BEEN ARGUED PUBLICLY ABOUT THE FACT THAT THE JUROR WAS A SOLE HOLD-OUT FOR A PARTICULAR VERDICT. SUCH WAS NOT DISCLOSED TO THE COURT.

THE COURT'S ROLE IS NOT TO PROTECT A PARTICULAR JUROR WHO MAY BE FAVORABLE OR UNFAVORABLE TO ONE SIDE OR THE OTHER. INDEED THE COURT HAS ALREADY REMOVED ANOTHER JUROR IN THIS CASE FOR SIMILAR REASONS OVER THE OBJECTION OF THE UNITED STATES.

THE FIFTH CIRCUIT HAS CLEARLY HELD THAT THIS COURT HAS THE DUTY AND RESPONSIBILITY TO CONDUCT THE INQUIRY THAT IT CONDUCTED AND THE COURT BELIEVES THAT IT HAS FOLLOWED TO THE LETTER THE REQUEST OF COUNSEL AFTER RESERVING TO COUNSEL THE OBJECTION TO THE COURT'S PROCEEDING IN ANY

EVENT INSOFAR AS THE DEFENDANTS ARE CONCERNED.

THE COURT BELIEVES THAT ITS DISCRETION WAS EXERCISED IN A FAIR AND IMPARTIAL MANNER AND IS FULLY SUPPORTED BY THE EVIDENCE WHICH WILL BE SET FORTH IN MORE DETAIL. THE COURT HAS THE DISCRETION UNDER RULE 23 TO CONCLUDE THIS CASE WITH A JURY OF LESS THAN 12, AND THE COURT HAS DETERMINED THAT THE JURY WILL PROCEED WITH ITS DELIBERATIONS WITH A JURY OF 11 JURORS EACH OF WHOM MUST STILL RETURN A UNANIMOUS VERDICT ON ANY VERDICT- THAT MAY BE RENDERED IN THIS CASE.

IT'S THE COURT'S HOPE THAT THIS BRIEF SUMMARY WILL ELIMINATE SOME OF THE WILD ACCUSATIONS AND SPECULATION REGARDING THE BACKGROUND IN THIS PARTICULAR MATTER, BUT THE COURT IS BY NO MEANS SUGGESTING THAT THERE ARE NOT ADDITIONAL PORTIONS OF THIS OPINION THAT I HAVE TO DICTATE. WE WILL NOW PROCEED WITH THE CLOSED PORTION OF THE OPINION.

(END OF PUBLIC OPINION)

(COURTROOM SEALED.)

THE COURT: I WANT TO ADOPT WHATEVER I HAVE ALREADY SAID. I DON'T WANT TO REPEAT WHAT I HAVE ALREADY SAID, AND SO THE COURT WILL ADOPT THE COURT'S PRIOR DECISION AND THE COURT WILL NOW EXPAND ON THE FAILURE OF THIS JUROR TO COMPLY OR HIS REFUSAL TO

COMPLY WITH THE COURT'S INSTRUCTIONS IN THIS PARTICULAR CASE.

THE COURT BASES THIS ON SEVERAL REASONS. THE COURT DOES NOT BELIEVE THAT THIS JUROR HAS FOLLOWED THE LAW AND THE INSTRUCTIONS AS GIVEN BY THE COURT TO HIM.

THE COURT FINDS THAT THIS JUROR DID, IN FACT, BRING MATTERS TO AND TOOK MATTERS FROM THE JURY DELIBERATION ROOM. THE COURT FINDS THAT THIS JUROR WAS NOT CANDID WITH THE COURT INSOFAR AS CERTAIN MATTERS ARE CONCERNED AND, MORE SPECIFICALLY, THE COURT BELIEVES THAT THE CUMULATIVE EFFECT OF NUMBER 68'S ACTIONS ON SEVERAL MATTERS LEADS THE COURT TO THE CONCLUSION THAT HE SHOULD HAVE BEEN REMOVED. AND BY THAT I MEAN THAT ON SEVERAL OCCASIONS DURING THE COURSE OF THE TRIAL, JUROR 68 HAS FOR SOME REASON TAKEN IT UPON HIMSELF TO DO THINGS THAT THE COURT HAS EXPRESSLY ORDERED JURORS NOT TO DO. FOR EXAMPLE, THE JURORS WERE TOLD THAT THEY COULD NOT HAVE COPIES OF THE TRANSCRIPTS. THE JUROR IN THIS CASE TOOK A COPY OF THE TRANSCRIPT, AND NOT ONLY TOOK IT BUT PUT IT IN HIS NOTES.

YOU WOULD THINK THAT MAYBE IF IT WAS ONE SHEET OF PAPER THAT WOULD CAUSE SOMEONE TO SAY IT WAS JUST ACCIDENTAL, BUT IN THIS PARTICULAR CASE THE TRANSCRIPT WAS IN A FOLDER, AND NOT ONLY WAS THE TRANSCRIPT IN A FOLDER, THE JUROR'S NUMBER WAS INSIDE OF THE TRANSCRIPT FOLDER, AND THE ONLY REASON THE COURT DISCOVERED IT

WAS BECAUSE IT FELL OUT OF THE NOTEBOOK WHEN THEY WERE BEING PICKED UP AT THE END OF THE DAY.

THE JUROR BROUGHT A DICTIONARY TO THE JURY DELIBERATION ROOM. IT IS AMAZING TO THE COURT THAT THE DICTIONARY WAS TAKEN INTO THE JURY DELIBERATION ROOM, AND NOT ONLY TAKEN, BUT USED BY THE JUROR TO DEFINE THREE VERY IMPORTANT LEGAL DEFINITIONS, THAT OF "CONSPIRACY, EXTORTION, AND EXTORT."

ON THE VERY DAY, THE FINAL DAY BEFORE THE COURT GAVE THE 96-PAGE INSTRUCTION, WHEN THE COURT WAS TRYING TO TELL THE JURORS WHAT TO EXPECT ON MONDAY WHEN THE COURT WOULD GIVE THEM THE FINAL CHARGE, THE COURT GAVE TO THESE JURORS A VERY SIMPLE INSTRUCTION AS THEY WERE LEAVING FOR THE DAY, AND THAT INSTRUCTION STATED AS FOLLOWS, AND THIS OCCURRED ON -- I DON'T KNOW THE DATE, BUT IT WAS THE LAST DAY -- AND I STARTED OFF: "LADIES AND GENTLEMEN OF THE JURY, IT IS NOW MY HONOR AND PRIVILEGE TO ADVISE YOU THAT YOU HAVE NOW HEARD ALL OF THE EVIDENCE IN THIS CASE AND YOU HAVE HEARD ALL THE ARGUMENTS OF COUNSEL, AND NOW IT IS MY RESPONSIBILITY AS THE PRESIDING JUDGE IN THIS CASE TO INSTRUCT YOU ON THE LAW. NOW, I WILL NOT DO THAT TODAY BECAUSE OF A HOLIDAY SCHEDULE."

BUT THEN I TOLD THEM A FEW THINGS, AND AT THE END, DURING THIS CONVERSATION, THE COURT TOLD THE JURORS AS FOLLOWS: "THE

COURT WILL ALLOW YOU TO ASK ME QUESTIONS BY WRITTEN NOTE, SHOULD YOU HAVE ANY QUESTIONS. THE FACT THAT I AM GIVING YOU THE JURY CHARGE DOESN'T MEAN THAT I WANT ONE OF YOU TO BE THE LAWYER AND EXPERT FOR THE WHOLE JURY. IF THERE IS SOME AGREEMENT AS TO WHAT YOU THINK THE LAW MEANS OR IF YOU DIDN'T UNDERSTAND ME, ALL YOU HAVE TO DO IS SEND ME A QUESTION. WHEN YOU SEND ME A QUESTION, YOU WILL NEVER IDENTIFY THE JUROR WHO WANTS TO KNOW THE ANSWER. YOU WILL ONLY SAY, WILL YOU PLEASE EXPLAIN WHATEVER IT MIGHT BE AND I WILL EITHER RESPOND TO YOU BY WRITTEN NOTE OR BRING YOU BACK INTO THE COURTROOM."

ON ONE OTHER OCCASION, AS COUNSEL WILL RECALL, I THINK IT'S JUROR NUMBER 160, AS WE WERE ENDING THE DAY, INQUIRED OF THE COURT WHETHER OR NOT THEY, THE JURY, COULD HAVE THE JURY CHARGE AND I TOLD THEM I WOULD SEND IT BACK, BUT AGAIN I CAUTIONED THEM THAT I DIDN'T WANT THEM TO BE JUDGES AND I THINK, IF YOU RECALL, THERE WAS SOME LAUGHTER IN THE COURTROOM AT THAT TIME REGARDING THIS MATTER.

BUT HERE'S THE PROBLEM. NOT ONLY DID THE JUROR NOT ASK THE COURT TO DEFINE THESE TERMS AND NOT ONLY DIDN'T HE INQUIRE -- AND MAYBE OTHERS DIDN'T EITHER -- AS TO WHETHER OR NOT THE DICTIONARY COULD GO INTO THE JURY DELIBERATION ROOM, BUT FOR THE FACT THAT THE MARSHAL SAW THE DICTIONARY IN THE ROOM, NEITHER COUNSEL NOR THE COURT WOULD HAVE KNOWN THAT THIS JUROR WAS

USING DEFINITIONS THAT HE SHOULD NOT HAVE BEEN USING.

ON ANOTHER OCCASION THE COURT INQUIRED OF THE JUROR REGARDING WHETHER OR NOT ANYTHING HAD BEEN TAKEN FROM THE JURY DELIBERATION ROOM. KEEP IN MIND, IT WAS THE DEFENDANTS AND THE GOVERNMENT, ALL OF WHOM INDICATED THAT THEY DIDN'T WANT ANYTHING TAKEN FROM THE JURY DELIBERATION ROOM AND, INDEED, THAT WAS INCLUDED IN THE COURTS FINAL JURY CHARGE TOWARD THE END.

THIS IS A CREDIBILITY ISSUE. AND THE COURT, IN EXAMINING ALL OF THE JURORS AS I WILL STATE IN MORE DETAIL IN A MINUTE, BUT I JUST WANT TO ITEMIZE THE THINGS THAT THE COURT IS DOING. NOT ONLY DID THIS JUROR VIOLATE THE COURTS INSTRUCTIONS BY BRINGING NOTES IN AND TAKING NOTES OUT OF THE ROOM, AND, IN SOME INSTANCES, USING NOTES THAT WERE BROUGHT INTO THE ROOM, THE COURT DOES NOT BELIEVE THIS JUROR WAS CANDID WITH THE COURT IN SPITE OF THE OVERWHELMING EVIDENCE PRESENTED BY TEN OF THE OTHER JURORS, EACH OF WHOM INDICATED THAT THIS JUROR HAD, IN FACT, TORN OUT PAPERS AND TOOK THEM OUT OF THE ROOM AND DID NOT BRING ALL THE PAPERS BACK IN.

AND JUROR 334, A JUROR WHOM THE DEFENDANTS HAVE DEFENDED TO THE NTH (SIC) DEGREE IN THIS CASE, AGAINST CONSTANT ATTEMPTS BY THE UNITED STATES TO REMOVE HER AS A JUROR AND WHO NOW, FOR SOME REASON, ARE ATTACKING HER CREDIBILITY, BUT

JUROR 334 CLEARLY STATED AND IDENTIFIED THE FACT THAT THIS JUROR HAD BROUGHT NOTES IN THROUGH HIS POCKET, HAD TAKEN THE NOTES OUT OF HIS POCKET IN AN APPARENT ATTEMPT TO SEE WHAT OR HOW THIS PERSON SHOULD VOTE ON VARIOUS MATTERS.

THE COURT'S CONCERN GOES BACK TO THE FACT THAT THE DICTIONARY WAS NOT DISCLOSED, THE TRANSCRIPT WAS NOT DISCLOSED UNTIL IT WAS DISCOVERED. AND THIS JUROR DID NOT CONTACT THE COURT BACK TO SAY THAT THE INFORMATION HE HAD GIVEN TO THE COURT EARLIER MAY NOT HAVE BEEN COMPLETE OR CORRECT. AND, AGAIN, THE COURT HAD TO CALL HIM UP AND ASK THE JUROR WHAT INFORMATION MIGHT HE HAVE TAKEN INTO THE JURY ROOM. EVEN HIS ADDITIONAL RESPONSES CONFLICT WITH THE OVERWHELMING EVIDENCE PRESENTED BY THE OTHER JURORS.

THE COURT BELIEVES THAT THIS JUROR AND HIS LACK OF CANDOR TO THIS COURT IS VERY SIMILAR TO THAT OF JUROR 350. IN THAT CASE, THE COURT TOOK CREDIBILITY INTO CONSIDERATION DESPITE THE FACT THAT MANY OF THE PEOPLE INVOLVED IN THAT CASE HAD CLOSE ASSOCIATIONS WITH AT LEAST THREE OF THE DEFENDANTS AND/OR THEIR FAMILIES AND OTHERS WHO TESTIFIED, AND REMOVED THAT JUROR FOR LACK OF CANDOR. AND IT WAS OBVIOUS TO EVERYONE INVOLVED THAT THAT JUROR, BASED ON THE TESTIMONY, HAD BEEN NOT GIVING THE COURT THE FULL STORY OF WHAT HAD HAPPENED.

SO, THEREFORE, THE FAILURE OR REFUSAL TO FOLLOW THE COURT'S INSTRUCTIONS, NOT ONLY ON THE LAW REGARDING THE LAW TO BE APPLIED IN THE CASE TO REACH A VERDICT, BUT AS TO WHAT COULD OR COULD NOT BE TAKEN FROM THE JURY ROOM, HIS FAILURE TO EXPRESS CANDOR WITH THE COURT FOR THE REASONS THAT I SAID ARE THE REASONS THE COURT BELIEVES THIS JUROR SHOULD HAVE BEEN REMOVED.

THE COURT DID NOT EXCUSE THIS JUROR FOR ANY OPINIONS THAT HE MAY HAVE REACHED BASED ON HIS EVALUATION OF THE EVIDENCE.

THE COURT WAS VERY CAREFUL IN FOLLOWING THE INSTRUCTIONS OF COUNSEL. AND ONCE THE JUROR GAVE HIS INITIAL ANSWER TO THE FIRST QUESTION PROPOUNDED TO HIM, THE COURT'S IMMEDIATE RESPONSE TO ALL COUNSEL WAS, I THINK THE ONLY THING NECESSARY FOR THE COURT TO DO NOW IS TO QUESTION PEOPLE REGARDING QUESTIONS 1, 2, 3, AND 5 WHICH HAD BEEN SUBMITTED AND AGREED TO BY THE PARTIES, AND THE COURT NO LONGER WANTED TO QUESTION EITHER JUROR 68 OR ANY OTHER JUROR REGARDING THE BASIS UPON WHICH THIS GENTLEMAN HAD BEEN VOTING IF, IN FACT, HE WAS VOTING ALL THE TIME. AND THE FACT THAT SOME JURORS HAD A CONCERN THAT HE JUST WALKED IN AND CHANGED HIS VERDICT WITHOUT GIVING ANY REASON PLAYED ABSOLUTELY NO PART IN THIS COURT'S DECISION. A JUROR CAN CHANGE HIS MIND EVEN WHEN BEING POLLED BY THE COURT AFTER THE RETURN OF A VERDICT, AND A JUROR CAN CHANGE HIS VERDICT ANY

TIME, OBVIOUSLY, WHEN THEY ARE DELIBERATING IN THE JURY DELIBERATION ROOM.

IT APPEARS TO THE COURT, AS THE OTHER CASES HAVE HELD THAT HAVE DISCUSSED THIS ISSUE, THAT WHEN THERE IS ANY POSSIBILITY THAT THE DEFENDANTS OR THE JUROR'S ACTIONS MIGHT BE BASED ON HIS EVALUATION OF THE TESTIMONY OR OTHER EVIDENCE IN THE CASE, THAT IS NOT GROUNDS FOR REMOVAL, EVEN THOUGH OTHERS MAY DISAGREE WITH WHATEVER POSITION HE HAS TAKEN. THE COURT FOLLOWED THAT DOCTRINE WHICH HAD BEEN SET FORTH IN THE BROWN CASE AND IN THE THOMAS CASE, AND FOLLOWS IT HERE TODAY. THERE IS SOME CONCERN ON THE COURT'S PART AS TO WHETHER OR NOT ONCE THE JUROR CHANGED HIS VERDICT OR VOTE, WHATEVER IT MAY HAVE BEEN, ON THAT MATTER THAT THE JURORS WERE TALKING ABOUT AS TO WHETHER IN THE FUTURE HE ENGAGED IN FURTHER DELIBERATIONS OR DID OR DID NOT CHOOSE TO VOTE BUT CHOSE TO PASS, BUT THESE FACTORS ARE NOT THE BASIS OF THE COURT'S DECISION.

THE DEFENDANT'S ACTIONS, OBVIOUSLY, RAISED SUSPICIONS WITH OTHER JURORS AS THEY HAVE TESTIFIED ABOUT --

MR. SMALL: I BELIEVE THE COURT SAID, "THE DEFENDANT'S ACTIONS."

THE COURT: OH, EXCUSE ME, I THOUGHT YOU SAID -- OH, THE JUROR'S ACTIONS -- I APOLOGIZE -- DURING THE COURSE OF THE DELIBERATION OBVIOUSLY CAUSED SOME

SUSPICIONS AMONG OTHER JURORS, BUT THE DEFENDANT'S FAILURE TO DELIBERATE -

MR. COLE: YOUR HONOR, --

THE COURT: EXCUSE ME, I AM SORRY - THE JUROR'S FAILURE TO DELIBERATE IS NOT THE BASIS FOR THE COURT'S OPINION IN THIS CASE.

IN REVIEWING THE EVIDENCE FROM THE INQUIRY CONDUCTED BY THE COURT OF THE VARIOUS JURORS AND AS I SAID EARLIER, CREDIBILITY HAS PLAYED A MAJOR ROLE IN THE COURT'S DECISION, AND, INDEED, AS I WILL STATE LATER, THE COURT HAS MUCH DISCRETION IN REVIEWING THE EVIDENCE IN MAKING CREDIBILITY JUDGMENTS. THE EVIDENCE TO THIS COURT SEEMED TO SUGGEST AS FOLLOWS: DESPITE MR. 68'S DENIAL OF HIS, THAT HE BROUGHT NOTES OUT OF THE ROOM OR BROUGHT NOTES BACK INTO THE ROOM ON THE FIRST INQUIRY THAT THE COURT CONDUCTED, JURORS 160, 334, 36, 134, 370, AND 237 SAW THE JUROR TAKE NOTES, LEAVE THE ROOM, THE JURY DELIBERATION ROOM, AND COME BACK WITH THE NOTES. THREE JURORS DID NOT SEE THE NOTES GO OUT, BUT SAW THE NOTES COME BACK IN, JURORS 11, 64, AND 235. TWO JURORS DID NOT SEE ANYTHING IN REGARD TO THIS MATTER, JURORS 335 AND 300, ALTHOUGH JUROR 335 TESTIFIED THAT THAT JUROR WAS TROUBLED BY WHAT HAD HAPPENED AFTER SHE LEARNED OF IT.

FOUR JURORS SAW NOTES COME OUT OF THE JUROR'S, 68'S POCKET, JURORS 160: 36; 334 -- WHO APPARENTLY WAS SITTING CLOSE TO HIM AT THE TIME -- AND 64.

TWO OF THE JURORS, NUMBERS 36 AND 334, TESTIFIED THAT THESE NOTES WOULD BE PULLED OUT AT THE TIME OF VOTES, AND JUROR 36 INDICATED THAT THE JUROR WAS VERY SUSPICIOUS.

JUROR 334 INDICATED THAT SHE BELIEVED THIS WAS DONE ON MORE THAN ONE OCCASION, BUT SHE WOULD ONLY TESTIFY THAT SHE SAW IT AT LEAST ONCE.

NOW, HERE'S THE PROBLEM WITH THIS. IN ADDITION, EVEN AFTER I BROUGHT THIS JUROR BACK IN, AND EVEN AFTER HE KNOWS THAT NOTHING SHOULD BE BROUGHT INTO THE JURY ROOM, THE JUROR STILL HAD THE NOTE IN HIS POCKET, LOCATED IN HIS WALLET. JURORS CONFIRMED, NOT ONLY OTHER JURORS, BUT JUROR 68, CONFIRMED THAT JUROR 68 WAS USING THE DICTIONARY, AND JUROR 68 INDICATED THAT HE HAD READ THE DEFINITION OF "EXTORTION" AND "EXTORT." HE HAD ALSO LOOKED AT THE WORD "CONSPIRACY," AND HAD CONTINUED TO HAVE THE DICTIONARY ON HIS DESK, AT HIS WORK STATION, EVEN THOUGH ANOTHER JUROR HAD EVEN TOLD HIM THAT HE WAS NOT SUPPOSED TO USE THOSE DEFINITIONS. I WANT TO MAKE THAT STATEMENT REALLY CLEAR. ANOTHER JUROR TESTIFIED THAT THE JUROR TOLD NUMBER 68 THAT HE WAS NOT TO USE THOSE DEFINITIONS BUT, IN FACT, WAS TO USE THE COURT'S DEFINITIONS.

THE COURT CONCLUDES THAT JUROR 68 DID, IN FACT, TAKE MATTERS OUT OF THAT ROOM,

SPECIFICALLY SEVERAL PAGES OF NOTES ON MORE THAN ONE OCCASION ON ONE DAY.

THE COURT FINDS, BASED ON THE EVIDENCE AND EVALUATION OF THE CREDIBILITY OF THE WITNESSES, THAT JUROR 68 BROUGHT NOTES BACK INTO THE ROOM, ALTHOUGH THE NUMBER OF NOTES BROUGHT BACK INTO THE ROOM WAS NOT, ACCORDING TO THE JURORS' OVERWHELMING EVIDENCE, THE SAME NUMBER OF PAGES THAT HAD BEEN BROUGHT OUT OF THE ROOM.

THE COURT FINDS THAT THE JUROR DID, IN FACT, HAVE NOTES IN HIS POCKET THAT HE BROUGHT INTO THE JURY ROOM FROM OVERNIGHT, AND THESE NOTES WERE, IN FACT, USED DURING THE COURSE OF THE DELIBERATIONS.

AS I INDICATED DURING ARGUMENT, THE COURT HAD HOPED THAT THE JUROR WOULD PERHAPS COME BACK LATER IN THE AFTERNOON OR THE NEXT DAY AND MAYBE CLARIFY THE SITUATION.

COUNSEL SUGGESTS THAT HE DIDN'T DO IT BECAUSE OF SPECIAL PERMISSION THAT HAD TO BE OBTAINED EARLIER. THERE WAS NO SPECIAL PERMISSION. THE COURT'S BASIC RULE IS YOU CAN'T TALK TO THE COURT, AND IF YOU WANT TO TALK TO THE COURT, YOU HAVE TO PUT IT IN A NOTE, BECAUSE I CAN'T COMMUNICATE DIRECTLY WITH JURORS UNLESS THEY DO IT THAT WAY. AND HE HAD BEEN GRANTED PERMISSION ONCE EARLIER TO SUBMIT A NOTE WITHOUT SENDING IT

THROUGH THE FOREMAN. NO SUCH REQUEST WAS MADE.

THE FOREMAN TESTIFIED THAT AFTER THEY WOULD TAKE A VOTE ON A PARTICULAR ISSUE, 68 TOOK PAPERS OUT. OTHER JURORS SAID IT APPEARED THAT HE WAS TAKING DOWN WHAT VARIOUS PEOPLE WERE SAYING. AND MANY JURORS EXPRESSED SUSPICIOUS CONDUCT ON THE PART OF THIS JUROR REGARDING THE MANNER IN WHICH HE WAS EITHER TAKING NOTES OR TAKING NOTES IN AND OUT OF THE ROOM.

AND BASED ON ALL OF THESE EVALUATIONS AND LOOKING AT THESE FACTS, KNOWING THE IMPORTANCE OF AND THE GREAT RESPONSIBILITY THE COURT WOULD HAVE IN MAKING THE DECISION, PARTICULARLY AFTER THE JURY HAD BEGUN ITS DELIBERATIONS, THE COURT BELIEVED THAT THE CANDOR EXPRESSED BY THIS JUROR AND HIS FAILURE OR REFUSAL TO FOLLOW THE COURT'S INSTRUCTIONS BEFORE AND DURING THE DELIBERATIONS WERE GROUNDS AND CONSTITUTED JUST CAUSE FOR HIS REMOVAL. AND THE COURT FURTHER FOUND THAT HIS OVERALL CONDUCT WAS INTERRUPTING THE ORDERLY PROCEDURE. AND WHEN I SAY HIS OVERALL CONDUCT, I DO NOT MEAN HOW HE VOTED OR DIDN'T VOTE.

JURORS APPARENTLY WERE GETTING VERY CONCERNED THAT THINGS THAT THEY WERE SAYING WERE BEING WRITTEN DOWN AND REMOVED FROM THE ROOM AND, INDEED, BASED ON WHAT THE COURT HAS LEARNED, THEY HAD SUFFICIENT REASON TO BE SUSPICIOUS.

THERE WAS A QUESTION MADE THAT ANOTHER JUROR, NUMBER 333, MAY HAVE HAD A MAGAZINE, BUT THAT WAS ADMITTED.

THE COURT, IN REVIEWING THIS MATTER, HAS FOLLOWED DECISIONS FROM THE FIFTH CIRCUIT AND OTHER CIRCUITS IN THE CONDUCT OF THIS INQUIRY. AND THE RECORD WILL REVEAL THAT AFTER THE APPROPRIATE OBJECTIONS HAD BEEN MADE BY THE PARTIES REGARDING THE COURT'S DECISION TO INTERVIEW EACH OF THE JURORS, THAT A PROCEDURE HAD BEEN ADOPTED BY THE COURT AND SPECIFICALLY REGARDING JUROR 68. HE, AS WELL AS THE OTHER JURORS, WOULD BE TOLD THAT EVERYONE IS BEING QUESTIONED AND THAT THE JURORS WERE GOING TO BE QUESTIONED IN THE ORDER IN WHICH THEY SAT IN THE JURY BOX. THE COURT WOULD SET FORTH THE PREFACE THAT I HAD TAKEN FROM THE DECISION IN THE --

(TO LAW CLERK) CAN YOU GO SEE IF THE BROWN CASE IS ON MY DESK? DID I JUST LEAVE IT THERE?

MR. COLE: YOUR HONOR, WHILE WE ARE WAITING, MAY I ASK -

THE COURT: PLEASE DON'T INTERRUPT ME. DON'T BREAK MY THOUGHT PROCESS UNLESS THERE IS SOME EMERGENCY.

MR. COLE: IT HAS TO DO WITH A STATEMENT THE COURT MADE IN THE PUBLIC PORTION WHICH MAY NOT BE COMPLETELY ACCURATE --

THE COURT: WHY DON'T YOU WAIT UNTIL I FINISH?

THE COURT FOLLOWED THE PREFACE, AS A PREFACE, THE STATEMENT MADE IN UNITED STATES VERSUS BROWN, 823 F.2D 591, AND THAT IS TO BEGIN WITH, "I DO NOT WANT TO KNOW HOW YOU HAVE VOTED OR HOW THE JURY HAS VOTED OR ANYTHING WITH RESPECT TO ANY VERDICT OR JUROR." AND IN CONNECTION WITH JUROR 68, THE COURT ASKED, CAN YOU TELL US GENERALLY WHAT THE NATURE OF THE PROBLEM IS IF, IN FACT, THERE IS A PROBLEM?

AFTER THE QUESTION WAS ANSWERED, AND THE ANSWER GIVEN INCLUDED HIS DISCUSSIONS ABOUT HOW HE WAS RELYING ON HIS CONSCIENCE, THE COURT NO LONGER, IN FACT, NO LONGER ASKED ANY QUESTIONS ABOUT THAT AND, INDEED, THE PROCEDURE WAS THAT WE WOULD NOT GO ANY FURTHER, BUT THAT WE WOULD COME BACK AND LET COUNSEL LISTEN TO THAT TAPE. THE COURT ALSO READ TO HIM PAGE 92, LINE 22 TO LINE 6, PAGE 93, OF THE JURY CHARGE. AND ONCE THE COURT RECEIVED THAT INFORMATION, THE COURT THEN CONCLUDED THAT BECAUSE THERE WAS A POSSIBILITY THAT THE JUROR'S ACTIONS WERE BASED ON HIS ASSESSMENT OF THE LAW AND EVIDENCE, THAT I SHOULD NO LONGER INQUIRE INTO MATTERS SUCH AS THIS INSOFAR AS THEIR DELIBERATIONS ARE CONCERNED.

THE COURT THEN TURNED TO QUESTIONS 1, 2, 3, AND 5 WHICH HAD BEEN SUGGESTED TO THE COURT BY THE ATTORNEYS IN THE CASE.

THESE QUESTIONS WERE:

1. WHAT MATERIALS, INCLUDING THE DICTIONARY AND THESAURUS, HAVE YOU BROUGHT INTO THE JURY ROOM? DESCRIBE EACH ITEM WITH PARTICULARITY.

2. WHAT WAS YOUR PURPOSE IN BRINGING THESE MATERIALS?

3. WHAT MATERIALS OF ANY TYPE WHATSOEVER HAVE YOU TAKEN FROM THE JURY ROOM? DESCRIBE EACH ITEM WITH PARTICULARITY.

5. WHAT WAS YOUR PURPOSE IN REMOVING THESE MATERIALS FROM THE JURY ROOM?

THE COURT DID, IN FACT, ASK JUROR 68 THOSE QUESTIONS, AND EXCEPT FOR THE DICTIONARY AND THESAURUS, JUROR 68 DID NOT ADMIT TO TAKING OR BRINGING ANY OTHER MATERIALS INTO THE ROOM OTHER THAN MEDICINE, COLD DRINKS, AND FOOD.

THE COURT THEN PLAYED THOSE ANSWERS TO COUNSEL. THE COURT THEN ASKED TWO ADDITIONAL QUESTIONS. IF HE HAS BEEN INTIMIDATED OR HAS HE INTIMIDATED OTHERS, AND WHETHER ANY RELIGIOUS BELIEFS PREVENTED HIM FROM SERVING AS A JUROR.

THE COURT STATED PUBLICLY, AND THE COURT STATES AGAIN PRIVATELY, THAT THE COURT'S DECISION IS IN NO WAY BASED ON THIS JUROR'S RELIGION OR RELIGIOUS BELIEFS EVEN

THOUGH THE FOREMAN HAD SOME CONCERNS ABOUT WHETHER OR NOT HIS RELIGION PLAYED A PART.

THE COURT BELIEVES THAT THE FACT THAT THE JUROR MAY HAVE BEEN A HOLDOUT WHICH THE COURT DOESN'T KNOW BECAUSE AT ONE POINT ONE OF THE JURORS SAID SEVERAL, ANOTHER POINT, IT MAY HAVE BEEN ONE, BUT IN UNITED STATES VERSUS LEAHY, THE FIFTH CIRCUIT INDICATED THAT EVIDENCE THAT THE JUROR WAS HOLDING OUT DOES NOT ALTER THE TRIAL COURT'S DISCRETION IN REMOVING THE JUROR. AND IN A CASE WHICH WAS WRITTEN BY CHIEF JUDGE KING, WHO WAS THEN A CIRCUIT JUDGE, IN UNITED STATES VERSUS HUNTRESS THE ISSUE INVOLVED IN THIS PARTICULAR CASE INVOLVED A NOTE THAT A JUROR HAD SENT, THE JURY HAD SENT TO THE JUDGE WHICH INDICATED THAT, "A JUROR DOESN'T WANT TO PARTICIPATE IN ARRIVING AT A VERDICT. WHAT DO WE DO?"

THE JUDGE'S RESPONSE WAS, "ALL JURORS WILL CONTINUE TO DELIBERATE UNTIL YOU HAVE REACHED A VERDICT." THE ISSUE BEFORE THE COURT WAS WHETHER OR NOT THE JUDGE HAD AN ADEQUATE OR FACTUAL LEGAL BASIS FOR DISMISSING THE JUROR.

AND THE DEFENDANTS IN THAT CASE RELIED ON A CASE THAT HAD PREVIOUSLY -- THE WILSON CASE. AND JUDGE KING -- IT'S UNITED STATES VERSUS WILSON, 894 F.2D 1245, WHICH HAPPENED TO BE AN ELEVENTH CIRCUIT CASE. AND JUDGE KING HELD, "WE FIND THE DISTRICT JUDGE HAD AN ADEQUATE FACTUAL AND LEGAL

BASIS FOR DISMISSING THE JUROR" -- HIS NAME IS VERY DIFFICULT TO PRONOUNCE -- "WILSON IN NO WAY STANDS FOR THE PROPOSITION THAT ANY EVIDENCE THAT A JUROR WAS A HOLDOUT RAISES A RED FLAG." AND IN THAT CASE THEN THEY WENT ON TO REVIEW THE EVIDENCE THAT THE COURT WAS JUSTIFIED IN REMOVING THAT PARTICULAR JUROR. IN THAT CASE IT HAPPENED TO BE FOR SOME MEDICAL REASONS.

THE COURT ALSO FINDS THAT HAD THE COURT NOT CONDUCTED AN INQUIRY INTO THIS PARTICULAR CASE, THE COURT WOULD HAVE BEEN FACED WITH A SIMILAR SITUATION AS THE JUDGE WAS FACED IN THE PAZ CASE WHERE THE COURT SENT THE CASE, REVERSED THE CONVICTION AND SENT IT DOWN BECAUSE THEY COULD NOT DETERMINE WHETHER OR NOT THE EXTRANEOUS MATTERS THAT HAD BEEN BROUGHT INTO THE JURY ROOM DID, IN FACT, PREJUDICE THE JURORS' VERDICT AND DELIBERATIONS.

THE FIFTH CIRCUIT IN THIS CASE, THE PAZ CASE, INDICATED THAT AN INQUIRY SHOULD HAVE BEEN MADE, THAT A CAUTIONARY INSTRUCTION SHOULD HAVE BEEN GIVEN, AND IN THIS PARTICULAR CASE, THE COURT LEARNED DURING THE COURSE OF THE DELIBERATIONS THAT NOT ONLY HAD THE WORD "EXTORTION" BEEN UNDERLINED, BUT THAT THE WORDS "CONSPIRACY" AND "EXTORT" HAD ALSO BEEN DISCUSSED, AND IT WAS APPROPRIATE FOR THE COURT TO GIVE, NOT ONLY TO CONDUCT THE INQUIRY, BUT TO GIVE A CHARGE TO THE JURY THAT THEY WERE TO DISREGARD ANY

DISCUSSION OF ANY DEFINITIONS OTHER THAN THOSE GIVEN BY THE COURT.

THE COURT, AS THE RECORD WILL REFLECT, HAS CAREFULLY FOLLOWED THE DICTATES OF UNITED STATES VERSUS THOMAS, AND THOUGH NOT A FIFTH CIRCUIT CASE, THE COURT BELIEVES THAT THE OPINION CORRECTLY SETS FORTH THE LAW. THE FIFTH CIRCUIT HAS HELD THAT IT WILL NOT DISTURB THE DISTRICT COURT'S DECISION TO REMOVE A JUROR UNLESS IT HAS PREJUDICED THE DEFENDANT AND, "WE WILL ONLY FIND PREJUDICE IF THE JUROR WAS DISCHARGED WITHOUT FACTUAL SUPPORT OR FOR A LEGALLY IRRELEVANT REASON." THE DISTRICT COURT ALSO HAS THE DISCRETION TO REMOVE A JUROR UNDER THE FIFTH CIRCUIT LAW WHEN THE COURT IS CONVINCED THAT THE JUROR IS NOT COMPLYING WITH HIS OATH.

THE FIFTH CIRCUIT HAS CONSISTENTLY HELD THAT THE DISTRICT COURT COULD, IN FACT, INTERVIEW ALL OF THE JURORS, AND THE FACT THAT ONE OF THE JURORS MAY HAVE BEEN "A HOLDOUT" DOES NOT AFFECT THE COURT'S ABILITY TO CONDUCT THE INVESTIGATION.

THE SECOND CIRCUIT IN THE THOMAS CASE HAS HELD THAT A JUROR WHO IGNORES HIS DUTY, HIS OATH OF OFFICE, AND WHO REFUSES TO FOLLOW THE COURT'S INSTRUCTIONS ON THE LAW AND WHO, THUS, THREATENS TO UNDERMINE THE IMPARTIAL DETERMINATION OF JUSTICE BASED ON LAW IS SUBJECT TO DISMISSAL DURING THE COURSE OF DELIBERATIONS UNDER RULE 23(B).

THE SECOND CIRCUIT HAS HELD THAT THIS CONCLUSION REINFORCES THE COURT'S INHERENT AUTHORITY TO CONDUCT INQUIRIES IN RESPONSE TO REPORTS OF IMPROPER JUROR CONDUCT AND TO DETERMINE WHETHER A JUROR IS UNWILLING TO CARRY OUT HIS DUTIES FAITHFULLY AND IMPARTIALLY.

THE RULE THE SECOND CIRCUIT ADOPTED IN THAT CASE APPLIES WITH EQUAL FORCE WHETHER OR NOT THE JUROR'S REFUSAL TO FOLLOW THE COURT'S INSTRUCTION RESULTS FROM A DESIRE TO NULLIFY THE APPLICABLE LAW, WHICH ARE NOT THE FACTS IN THIS CASE, OR FROM THREATS WHICH THE COURT DOES NOT BELIEVE ARE THE FACTS IN THIS CASE.

BUT THE FACT IS THAT A VIOLATION OF THE COURT'S INSTRUCTIONS, THE FAILURE OR REFUSAL TO FOLLOW THE COURT'S INSTRUCTIONS, THE FAILURE TO BE CANDID WITH THE COURT, ALL OF WHICH THE COURT BELIEVES OCCURRED IN THIS CASE INSOFAR AS JUROR 68 IS CONCERNED AMOUNT TO JUST CAUSE TO REMOVE A JUROR UNDER RULE 23(B).

INSOFAR AS THE ISSUE OF WHETHER OR NOT THERE WAS PRESSURE OR THREATS OR INTIMIDATION, I THINK THE EVIDENCE REVEALS THAT THERE WAS, IN FACT, HEATED DISCUSSION NOT ONLY INVOLVING JUROR 68 WHICH WAS DIRECTED TO HIM AND PROBABLY FROM HIM, BUT THE OVERALL CONTEXT OF THESE DELIBERATIONS DO NOT SURPRISE THE COURT CONSIDERING THE NATURE OF THIS CASE. BUT THREATS OR INTIMIDATION PLAYED NO PART IN

THE COURT'S OPINION IN 68'S REFUSAL TO BE CANDID WITH THE COURT AND TO FOLLOW THE COURT'S INSTRUCTIONS AND TO APPLY THE LAW AS GIVEN TO HIM BY THE COURT.

YESTERDAY THE COURT DENIED A MISTRIAL BECAUSE THE COURT BELIEVES THAT IT ACTED APPROPRIATELY NOT ONLY IN CONDUCTING THE INVESTIGATION, WHICH THE COURT BELIEVES WAS JUSTIFIED UNDER THE FACTS OF THIS CASE AND, INDEED, THE COURT WOULD HAVE BEEN DERELICT IN ITS OWN DUTY NOT TO CONDUCT SUCH AN INQUIRY, BUT THE COURT ALSO BELIEVES THAT ITS REASONS FOR DISCHARGING NUMBER 68 FOR THE REASONS GIVEN IN THIS OPINION REQUIRE AND SUPPORT THE COURT'S DECISION.

THE COURT ALSO REFUSED TO STAY THE CASE. THE COURT DOES NOT BELIEVE THAT IT IS APPROPRIATE TO STAY THE CASE PENDING ANY APPEALS, AND I AM NOT EVEN SURE IF THERE CAN BE AN INTERIM APPEAL IN A CASE SHORT OF MANDAMUS, BUT THE COURT DENIED A REQUEST FOR A STAY.

INSOFAR AS JURY INSTRUCTIONS ARE CONCERNED, THE COURT BELIEVES THAT IT HAS PROPERLY CHARGED THE JURY SUBSEQUENT TO THE REMOVAL OF 68. AND THE RECORD WILL REFLECT THAT NOT ONLY HAS THE COURT PROPERLY INSTRUCTED THIS JURY, BUT THE COURT HAS ALSO CONDUCTED A VOIR DIRE OF THE JURY TO INSURE THAT EACH MEMBER OF THIS JURY COULD DISREGARD WHATEVER EFFECT ANY OF THE EVENTS WHICH PRECEDED THE REMOVAL

OF 68 AND THE ACTUAL REMOVAL OF 68 WAS CONCERNED AND COULD REACH A FAIR, HONEST, IMPARTIAL VERDICT BASED ON THE LAW AND EVIDENCE.

EACH OF THE JURORS ADVISED THE COURT THAT THEY COULD CONTINUE TO SERVE AS FAIR, HONEST, IMPARTIAL JURORS. EACH OF THE JURORS ADVISED THE COURT THAT THEY WOULD NOT SHOW ANY BIAS, PREJUDICE, OR SYMPATHY FOR OR AGAINST THE GOVERNMENT OR THE DEFENDANTS BECAUSE OF THE DELAY, THE REMOVAL, THE HEARINGS CONDUCTED.

THE COURT WAS SATISFIED THAT THIS JURY REMAINS PROPERLY CONSTITUTED. THE COURT IS SATISFIED THAT THIS JURY WILL CONTINUE TO EVALUATE THE EVIDENCE IN A FAIR, HONEST, IMPARTIAL MANNER.

THE COURT WAS NOT HAPPY WITH THE DELAY THAT OCCURRED, BUT THE COURT BELIEVES THAT TO NOT HAVE CONDUCTED THE INQUIRY INVOLVING MR. 68 WHEN HE SENT HIS OWN NOTE AND SUCH INQUIRY ENDED UP IN - IT RESULTED ONLY IN A CHARGE TO THE JURY – BUT THE COURT WAS ALSO JUSTIFIED IN RESPONDING - TO THE JURY'S NOTE.

THE INSTRUCTIONS GIVEN ALSO ADVISED EACH OF THE JURORS THAT THEY WOULD CONTINUE TO BE THE FACT FINDERS IN THIS CASE, THAT NOTHING THAT THE COURT SAID OR DID DURING THE COURSE OF THE INQUIRY OR ITS DECISION SHOULD INTERFERE WITH THAT PROCESS.

THE COURT FURTHER INDICATED, AND THE JURY RESPONDED AFFIRMATIVELY, THAT THE JURY WAS TO SET ASIDE ANY CONCERNS THAT THEY HAD, THAT THIS COURT -- IF THEY HAD ANY -- THAT THIS COURT WAS TAKING THE SIDE WITH 68 OR THE POSITION OF 68 AND FOR OR AGAINST ANY OTHER JURORS IN THIS PARTICULAR CASE.

THIS COURT BELIEVES THAT THIS JURY WILL CONTINUE TO FAIRLY EVALUATE THE TESTIMONY BASED ON THE LAW AND EVIDENCE, AND THIS COURT BELIEVES, FOR REASONS THAT I HAVE STATED TODAY PUBLICLY AND NOW, AND RESERVING MY RIGHT TO SUPPLEMENT ORAL REASONS WITH WRITTEN REASONS AT A LATER DATE, THAT NUMBER 68 WAS REMOVED FROM THIS JURY FOR JUST CAUSE FOR THE REASONS STATED.

THIS DECISION WILL ALSO SUPPORT THE COURT'S DECISION TO DENY THE MOTION FOR MISTRIAL ON ALL GROUNDS ASSERTED INCLUDING A REQUEST FOR A MISTRIAL BASED ON THE COURT'S INQUIRY BOTH AS TO THE VOIR DIRE OF THE JURY DURING THE INVESTIGATION OF THE NOTE AS WELL AS THE INDEPENDENT INVESTIGATION REGARDING THE GATLINS AND OTHERS.

THE COURT ALSO ADOPTS AS ITS REASONS GIVEN HEREIN, IT ADOPTS THESE REASONS IN SUPPORT OF ITS DECISION TO DENY THE REQUEST FOR A MISTRIAL ON THE ACTUAL REMOVAL OF 68, AND THE COURT ASSIGNS THESE REASONS ALSO FOR THE COURT'S REFUSAL TO STAY THIS CASE PENDING APPEAL.

NOW, WHAT MISTAKE DID I MAKE, MR. COLE?

MR. COLE: YOUR HONOR, I'M NOT SURE IT'S SIGNIFICANT ENOUGH TO RAISE AT THIS POINT, SO I'LL WITHDRAW IT.

THE COURT: WELL, THOSE ARE MY REASONS, GENTLEMEN AND LADIES.

(WHEREUPON, THE COURT WAS AT RECESS FROM 12:00 NOON TO 3:15 P.M.)

THE COURT: BE SEATED.

(JURY ENTERS AT 3:15 P.M.)

THE COURT: BE SEATED. OVER THE WEEKEND DON'T READ, LISTEN OR WATCH ANY NEWS ACCOUNTS. DON'T DISCUSS THE CASE. DON'T DO ANY DELIBERATIONS.

DO YOU ALL WANT TO START AGAIN AT 8:00 MONDAY?

THE JURY: YES.

THE COURT: SEE YOU AT EIGHT O'CLOCK ON MONDAY.

THE JURY IS EXCUSED. (JURY EXCUSED AT 3:16 P.M.)

(WHEREUPON, THE COURT, WAS AT RECESS.)

CERTIFICATE

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

s/_____
BARBARA DAVIS PHIPPS, CCR
OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA **CRIMINAL ACTION**

VERSUS

EDWIN EDWARDS, ET AL. **No. 98-165-B-M2**

RULING ON GOVERNMENT'S MOTION FOR TRIAL OF THE DEFENDANT BOBBY JOHNSON IN ABSENTIA

For written and oral reasons to be assigned at a later date, the motion of the United States to try the defendant Bobby Johnson in absentia is granted. Nothing herein shall prevent or preclude Bobby Johnson from participating in this case either in person or through other options previously noted by the court including teleconference and audio feed to a site off the courthouse premises or to another room in the courthouse.

IT IS SO ORDERED.

Baton Rouge, Louisiana, this 9th day of April, 2000.

s/
Frank J. Polozola, Chief Judge
Middle District of Louisiana

Nameless Juries Are on the Rise in Crime Cases
By Adam Liptak

The Wisconsin Supreme Court will soon decide whether Sherrie S. Tucker is so dangerous that her case required an anonymous jury.

Ms. Tucker would not strike most people as particularly scary. When she was arrested on cocaine charges in 1998, she was 16 years old and six months pregnant. She was just over four feet tall and weighed 90 pounds.

The trial judge, Emily S. Mueller of Racine County Circuit Court, said it was her practice in all drug cases to refer to jurors by number rather than name because they might be subject to reprisals from dealers.

Judge Mueller and other Wisconsin judges who share her philosophy are not alone in using anonymous juries in everyday cases. Begun 25 years ago in a notorious drug case in New York to guard against jury tampering, the practice has spread in state and federal courts, sometimes in cases that are quite routine.

It has gained support from prosecutors, the courts and some legal experts. No longer is the rationale simply that jurors must be shielded from threats of retaliation. Supporters argue that anonymity protects jurors from being badgered by reporters after their verdicts, and makes them feel more comfortable about serving.

Critics, including defense lawyers and civil libertarians, say the practice erodes the presumption of innocence before the trial begins. Lawyers for news organizations add that the inability to interview jurors after trials makes juries less accountable.

By most accounts, the first anonymous jury in the United States was employed in 1977, in a 15-defendant organized crime case in a New York federal court. The trial judge, Henry F. Werker, ordered anonymity even though neither the prosecution nor the defense had requested it. Eleven defendants, including Leroy Barnes, a major heroin dealer known as Nicky, were convicted.

Their primary argument on appeal in 1979 was that the procedure was unconstitutional.

The appeals court disagreed. "The law as to jury selection is not so unbending," it said, "that it cannot, or should not, be accommodated to the realities of modern-day trials in large narcotics cases which have created such problems for the courts in large cities."

The court cited "the sordid history of attempts at influencing witnesses and jurors in cases such as these" and jurors' fears of retaliation by convicted defendants or their associates.

A dissenting judge, James L. Oakes, said the decision created "an entirely new rule of law that so far as I know stands without precedent in the history of Anglo-American jurisprudence." Judge Oakes predicted that other courts would follow the precedent as surely as "a flock of sea gulls follows a lobster boat."

They have. Anonymous juries have since been used in the trials of the Branch Davidians, of the police officers accused of assaulting Rodney King and Abner Louima, and of John Gotti, O. J. Simpson and Oliver North. They have been used in a case involving the killing of a doctor who performed abortions, in the trial of the 1993 Word Trade Center bombers and in countless narcotics and organized crime cases.

Increasingly, they are being used in more mundane cases.

This month, an anonymous jury in Madison, Wis., convicted Steven A. Magritz, a tax protester, of filing false liens against government officials. Judge C. William Foust of Dane County Circuit Court said he granted the prosecution's request because he was concerned that jurors might fear that Mr. Magritz would file similar liens against them.

"I want jurors to feel that they can vote and deliberate on the allegations in the case with a clear conscience and not have any extraneous forces acting on them," Judge Foust said in court.

Statistics on anonymous juries are hard to come by, but there is little doubt that their use is increasing. The practice was discussed in some 30 judicial decisions in the decade after the Barnes decision in 1979. In the dozen years since, about 180 decisions discussed anonymous juries.

In August, the United States Court of Appeals for the Fifth Circuit, in New Orleans, upheld the use of anonymous juries in the corruption trials of Edwin W. Edwards, the former governor of Louisiana, and Jim Brown, a former state insurance commissioner.

The court noted that without anonymity, jurors might have been pestered by the news media. Mary Ellen Roy, a lawyer in New Orleans who represents news organizations, said the decision would be likely to increase the use of anonymous juries.

In the case of Ms. Tucker, the young Wisconsin woman charged with selling cocaine, the appeals court was skeptical of Judge Mueller's suggestion that she posed a

threat to the jurors. But it said that the routine use of anonymous juries might be justified "not in response to a particular need for juror protection or to withhold information," but "to accommodate jurors in an unfamiliar and intimidating setting." The Wisconsin Supreme Court is now considering the case. (Immediate appeals of trial judges' anonymity orders are all but impossible in most states.)

The primary cost of the procedure, critics say, is in the harm it does to the presumption of innocence.

"An anonymous jury raises the specter that the defendant is a dangerous person from whom jurors must be protected, thereby implicating the defendant's constitutional right to a presumption of innocence," the federal appeals court in Atlanta wrote in 1994.

Nancy J. King, a law professor at Vanderbilt University, agrees that this is a danger, but says the solution is to use anonymous juries routinely.

"If it's done selectively, then it could send a message to the jury that there is something to be feared from this defendant," said Professor King, the leading proponent of anonymous juries.

But another expert in criminal procedure, Prof. Abraham Abramovsky of Fordham Law School, says this reasoning is flawed.

"The right place to draw the line," Professor Abramovsky said, "is that unless you have reasonable grounds to show the court that tampering has happened in the particular case or that the defendant has a rich history of tampering, there should never be an anonymous jury."

Roy Korte, the assistant attorney general in Wisconsin who prosecuted Mr. Magritz, said the associated stigma need not be severe.

"It depends on how it's handled," Mr. Korte said. "If you make a big deal out of it, perhaps so."

He said some judges tell juries that anonymity is standard practice, even when it is not. That may address the question of stigma, he said, but at the expense of candor.

Professor King said that withholding names and addresses should not stop lawyers from questioning jurors about their possible prejudices.

"You can reveal lots and lots of information about them without learning exactly who they are," she said. "You can be fairly assured that the juror is not biased."

Lawyers for news organizations say there is a second problem with the procedure: it makes it harder to question jurors about how and why they arrived at their decisions.

Proponents of anonymous juries question the legitimacy of such questioning and emphasize the unsought burdens of jury service.

Jurors are made to reveal intimate or damaging information about themselves in questioning. They must make grave decisions collectively, something that many find stressful. They may fear, justifiably or not, that their verdicts will subject them to reprisals.

"On top of all this," Professor King wrote in The Vanderbilt Law Review in 1996, "jury service exposes jurors, their families and their friends to retaliatory threats

and unwanted attention from defendants, victims and sympathizers."

She concluded that there was a "growing crisis of juror dread" that called for routine anonymity.

Mr. Korte agreed that jurors were often uneasy. "Even in a mundane case," he said, "you hear jurors saying, 'I really don't want all the personal information out in public.'"

But Lucy Dalglish, the executive director of the Reporters Committee for Freedom of the Press, called such fears overstated.

"If you don't want to answer a question," Ms. Dalglish said, "you just say, 'Sorry, I don't want to talk.' The word 'no' works really well."

In the Wisconsin drug case, Ms. Tucker was convicted and sentenced to probation. Her lawyers told the Wisconsin Supreme Court that the use of an anonymous jury was unwarranted, given her age and size.

"Tucker's appearance probably aroused no suspicion that she held a powerful position in a violent organized crime enterprise," they wrote.